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No. —— 00 746

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit held that the U.S. Environmental Protection Agency (EPA) reasonably defined the term "reservation" in the Clean Air Act (CAA) as including lands, located outside the boundaries of formal reservations, which are taken into trust for tribes pursuant to the Indian Reorganization Act (IRA). As a consequence, tribes are now authorized to redesignate under CAA § 164(c) such current and future trust lands to a more stringent air quality classification, an action that can override the implementation by a state of its own land use development policies, preclude construction of new industrial facilities, and impose costly restrictions on the operation of existing facilities in state lands bordering the redesignated tribal lands. The court also held that the CAA expressly delegates to tribes authority to adopt air programs for lands within reservations that are owned in fee by non-Indians and that were subject to state air quality regulation prior to the 1990 Amendments to the CAA. The questions presented are:

1. Whether EPA has the discretion to interpret the CAA in a manner that expands the lands tribes may redesignate to include IRA trust lands and other lands located outside of reservations established by treaty, Executive Order, or Act of Congress.

2. Whether the CAA can be construed as divesting the states of their sovereign authority by delegating authority to tribes over non-Indian fee lands previously within the sovereign jurisdiction of a state, when the CAA expressly provides that no provision therein precludes or denies a state's authority to adopt and enforce standards for lands within its territorial boundaries.

PARTIES TO THE PROCEEDINGS

1. The following were petitioners in the consolidated proceeding, the judgment in which review is sought, and who join in this petition.

In No. 98-1203, the National Association of Manufacturers, the Michigan Chemical Council, the Timber Producers Association of Michigan and Wisconsin, Inc., and the Rhinelander Area Chamber of Commerce, Inc. (hereinafter, the National Association of Manufacturers, *et al.*).

In No. 98-1207, Salt River Project Agricultural Improvement and Power District (in its capacity as operating agent for the Navajo Generating Station), and Public Service Company of New Mexico.

2. The following were petitioners in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

In No. 98-1196, Arizona Public Service Company.

In No. 98-1203, the American Forest & Paper Association.

In No. 98-1206, the National Mining Association.

In No. 98-1207, Nevada Power Company, and Tucson Electric Power Company.

In No. 98-1208, Oklahoma Gas & Electric Company.

3. The following was respondent in the consolidated proceeding, the judgment in which review is sought.

United States Environmental Protection Agency.

4. The following were intervenors in the consolidated proceeding, the judgment in which review is sought, and who join in this petition.

The State of Michigan.

5. The following were intervenors in the consolidated proceeding, the judgment in which review is sought, and who do not join in this petition.

Central and South West Services, Inc.
Gila River Indian Community.
Navajo Nation.
Salt River Pima-Maricopa Indian Community.
Shoshone-Bannock Tribes.

DISCLOSURE STATEMENT

No parent corporation or publicly held company owns 10% or more of either Salt River Project Agricultural Improvement and Power District or Public Service Company of New Mexico. The National Association of Manufacturers, *et al.*, are each a trade association and none of these entities is a parent, subsidiary, or affiliate of any corporation or other entity which has issued shares or debt securities to the public.

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PETITION FOR A WRIT OF CERTIORARI

The State of Michigan, Salt River Project Agricultural Improvement and Power District, Public Service Company of New Mexico, and the National Association of Manufacturers, *et al.*, (Petitioners) respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Arizona Public Service Co., Inc., et al. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

OPINION BELOW

The opinion of the court of appeals (App. 1a-49a) is reported at 211 F.3d 1280, 341 U.S. App. D.C. 222. The orders on the petitions for panel and *en banc* rehearing and the court of appeals' mandate are included in the Appendix (App. 135a-140a).

JURISDICTION

The court of appeals entered its judgment on May 5, 2000. Timely petitions for panel and *en banc* rehearing were denied by orders of the court of appeals entered on July 12, 2000. The court's mandate issued on July 27, 2000. On September 27, 2000, the Circuit Justice for the District of Columbia Circuit extended the deadline for the filing of the instant petition to and including November 9, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

This case involves portions of the Clean Air Act §§ 110, 164, and 301 (App. 141a-147a), the Indian Reorganization Act, §§ 461 and 465 (App. 148a-149a), and

the Tribal Authority Rule, 63 Fed. Reg. 7254 *et seq.*, and 40 C.F.R. Part 49 (App. 50a-134a).

STATEMENT OF THE CASE

This case presents important issues involving federal Indian law and the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (CAA or the Act) that are of national importance. In its decision below, the D.C. Circuit has fundamentally rearranged the balance of state and tribal jurisdiction. The court's unprecedented decision permits tribes to exercise CAA authority over not only lands that had been formally established as tribal reservation lands at the time the CAA was enacted, but also over lands that are taken into trust for the benefit of the tribes by the U.S. Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA). Lands taken into trust under the IRA can include territory within a state that had always previously been within the state's sovereign jurisdiction. The decision below has thereby exacerbated the tensions that have long existed between states protective of their sovereign authority and tribes anxious to expand the scope of the territory within their control.

Some historical background is necessary in order to understand the disruptive potential of the decision below. Under a later-abandoned policy of assimilation, the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*, commonly known as the Dawes Act, encouraged the alienation of tribal reservation lands, with patents in fee being issued to individual Indian allottees. Much of this fee land was later sold to non-Indians. The Dawes Act also permitted lands within reservations which were not allotted to individual Indians to be opened to non-Indian settlement.

Beginning in 1934, the IRA put an end to the further alienation of tribal lands. IRA § 1, App. 148a. The IRA did not, however, automatically restore to tribes the millions of

acres of land which had been sold to non-Indians over the course of the preceding 50 years. Consequently, tribal reservations are to this day marked by a checkerboard pattern in which tracts of land held in fee by non-Indians are interspersed throughout tribal reservations. In some cases, large portions of the lands within a tribal reservation may be owned by non-Indians. *See, e.g., Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1016 (8th Cir. 1999) (approximately half of reservation land area held in fee by non-Indians).

The question of who may exercise civil jurisdiction over these non-Indian fee lands located within the exterior boundaries of reservations – the state or the tribe? – has long been a contentious one. Lands located within reservation boundaries, although held in fee by non-Indians, retain their character under federal law as "Indian country."[1] Tribes generally exercise civil jurisdiction, to the exclusion of the states, over "Indian country," except where such authority has been granted to a state by treaty or Act of Congress. *See*,

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[1] "Indian country" is defined at 18 U.S.C. § 1151. In relevant part, the statute provides the term means

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although relating by its terms only to federal criminal jurisdiction, this definition also generally applies to questions of civil jurisdiction. *See, e.g., DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975).

e.g., *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973).

At the same time, sharp limits exist on the authority of tribes to regulate the conduct of non-Indians within reservation boundaries, where the conduct in question occurs on lands held in fee by non-Indians. The general rule, as expressed by this Court in *Montana v. U.S.*, 450 U.S. 544 (1981), holds that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes," and so "cannot survive without *express congressional delegation*." 450 U.S. at 564 (emphasis added).[2]

Lands taken into trust under the IRA create a further complication. While the IRA did not directly restore to tribes the lands alienated during the Dawes Act era, it does authorize the U.S. Secretary of the Interior to acquire on behalf of tribes "any interest in lands, . . . within or without existing reservations," title to which is to be "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." IRA § 5, App. 148a-149a. Under the IRA, the Secretary may, without any apparent guidance from Congress as to the scope of his discretion, take into trust lands acquired for tribes by the federal government or acquired by the tribes themselves. This includes parcels of land, both large and small, that a

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[2] The Court also recognized, however, in what has become known as the "second exception" to *Montana*'s general rule, that a tribe "may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation" when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

tribe might purchase *outside* the boundaries of its reservation.[3]

While, on its face, IRA § 5 merely provides that lands taken into trust "shall be exempt from State and local taxation," the U.S. Department of the Interior and lower courts have generally assumed that such trust lands take on the full character of "Indian country" within the meaning of 18 U.S.C. § 1151.[4] Under this assumption, the IRA operates as a mechanism by which not only tribal lands lost to the assimilationist policies of the Dawes Act era, but also lands that, as a historical matter, have *never* been within tribal control, can be removed from the jurisdiction of the state.

This feature of the IRA, by which a state can presumptively be divested of its sovereign jurisdiction with respect to lands over which is previously possessed control, through an unbounded discretionary act by a federal department, has not escaped challenge. In *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), IRA § 5 was struck down as an "unconstitutional delegation of legislative power." The Interior Department subsequently petitioned for, and was granted, certiorari by this Court, but before hearing the case on the merits the Court vacated the Eight Circuit's decision and remanded for reconsideration in light of an assertedly-changed Department position. *See U.S. Dep't of Interior v. South Dakota*, 519 U.S. 919 (1996).[5]

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[3] Some tracts of this trust land can be quite small (*e.g.*, no more than an urban house lot), and lands held in trust are often mingled with lands owned in fee by both Indians and non-Indians alike. *See, e.g.*, Comments of the State of Oklahoma, Department of Environmental Quality, Regarding Indian Tribes Air Quality Planning and Management (Nov. 23, 1994), EPA Air Docket No. A-93-3087, IV-D-48, at 1.

[4] *See, e.g.*, 64 Fed. Reg. 17,578 (April 12, 1999); *see also Connecticut v. Blumenthal*, 228 F.3d 82 (2nd Cir. 2000).

[5] Justice Scalia, joined by Justices O'Connor and Thomas, dissented from the Court's action.

It is against this backdrop of complex Indian law issues that Congress has legislated to permit tribes to exercise a measure of authority over air resources on lands falling within tribal jurisdiction. Shortly after passage of the Clean Air Act in 1970, EPA promulgated regulations designed to "prevent the significant deterioration" of the air quality in areas cleaner than required by the national ambient air quality standards (NAAQS). Among the features of these "PSD" regulations, 39 Fed. Reg. 42,510 (Dec. 5, 1974), all areas of the country that had cleaner air than required by the NAAQS were to be designated as "Class I," "Class II," or "Class III."

All such areas were initially designated as Class II, under which a moderate amount of deterioration in air quality was to be permitted. The PSD regulations further provided that areas could be *redesignated* to either Class I, under which very little deterioration would be allowed for both the area in question *and* for lands located considerable distances from the area, or to Class III, under which the quality of the air would be permitted to deteriorate up to the levels specified by the NAAQS.

EPA in the 1974 PSD rulemaking afforded tribes a limited measure of authority to regulate air quality on their own lands, by providing that tribes as well as states could make redesignations. Specifically, the 1974 PSD regulations provided, in pertinent part, that "[w]here a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III." 40 C.F.R. § 52.21(c)(3)(v) (1974).

Notably, a tribe's redesignation authority under the 1974 PSD regulations did not extend to the entirety of "Indian country," but only to an "Indian Reservation." EPA defined that term to mean "any federally-recognized reservation *established by Treaty, Agreement, Executive Order, or Act of Congress.*" 40 C.F.R. § 52.21(b)(4)(1974) (emphasis added). This definition thus incorporated the full

range of political mechanisms by which public lands have been "reserved" for the benefit of Indian tribes by direct action of Congress or the President over the course of the country's history. *See, e.g., Sioux Tribe of Indians v. U.S.*, 94 Ct.Cl. 150, 170 (1941), *aff'd* 316 U.S. 317 (1942) (Observing that there are "three kinds of Indian reservations: those which are created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for the use of the Indians in order to keep them within a certain territory.").[6]

In 1977, Congress made significant revisions to the CAA. Among other things, the 1977 CAA Amendments codified, with certain changes, EPA's 1974 PSD regulations, retaining the basic structure of EPA's classification scheme for those areas of the country whose air was cleaner than required by the NAAQS. As had been the case under the 1974 PSD regulations, an area's designation established the maximum degree to which concentrations of various regulated pollutants over baseline levels, known as "increments," would be permitted to increase in that area. Under CAA § 163(b), the increments for Class I were made four to 10 times more stringent than the corresponding Class II increments.

In turn, CAA § 161 required that "each applicable implementation plan" contain "emission limitations and such other measures as may be necessary" to prevent significant

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[6] The creation of Indian reservations through treaties was ended by Congress in 1871. *See* 25 U.S.C. § 71. When formal treaty making was abandoned, the federal government continued to make agreements with Indian tribes, which agreements were similar to treaties but which required approval by both houses of Congress. *See generally* Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.) at 105-07. Congress prohibited the creation of further "Executive Order reservations" in 1919. *See* 43 U.S.C. § 150; *see also* 25 U.S.C. § 398d.

deterioration of the air quality in *any* clean air area. As a consequence, redesignation has an immediate impact on nearby facilities regulated under the CAA, with additional controls or even shutdown being required if necessary in order to protect a Class I area's more stringent increments.

In 1977, Congress initially designated the entire geographic area of the country as Class II (with the exception of specified parks of a certain size, which were permanently designated Class I). CAA§ 162. At the same time, pursuant to CAA § 164(a), states were authorized to redesignate the balance of the lands within their borders as either Class I or as Class III, with one significant exception: CAA § 164(c) specified that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." App. 144a-145a.

Thus, Congress expressly delegated to tribes authority to redesignate their reservations, as they had previously been permitted to do by EPA in its 1974 PSD regulations.[7] While the 1977 Amendments did not include a statutory definition for the term "reservation," the Amendments were adopted against the backdrop of the 1974 PSD regulations. As a result, following enactment of the 1977 Amendments, EPA continued to define "reservation" to mean a federally-recognized reservation "established by Treaty, Agreement, Executive Order, or Act of Congress." *See* 40 C.F.R. § 52.21 (b)(15) (1978); 43 Fed. Reg. 26,404 (June 19, 1978).

Congress did not undertake another major revision to the CAA until 1990. At that time, EPA was directed to "promulgate regulations . . . specifying those provisions" of

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[7] Both states and tribes were afforded unlimited discretion in making their redesignation decisions, with EPA being authorized to disapprove a redesignation request only where certain procedural requirements have not been met. *See* CAA § 164(b)(2), App. 144a.

the CAA "for which it is appropriate to treat Indian tribes as States," with such treatment of a given tribe being authorized under the Act "only if" certain specified conditions are met. CAA § 301(d)(2), App. 146a-147a. Among other things, the "functions to be exercised" by the tribe have to "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA § 301(d)(2)(B), App. 147a.

In addition, the Agency was also authorized, although not required, to "promulgate regulations which establish the elements of tribal implementation plans," or TIPs. CAA § 301(d)(3), App. 147a. Under CAA § 110(o), when a TIP "becomes effective in accordance with the regulations promulgated" under CAA § 301(d), the TIP will "become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." App. 141a.

The 1990 CAA Amendments made no changes to the tribal redesignation provisions in CAA § 164(c). And while the term "reservation" was used throughout the new "treatment as States" provisions, as in 1977, Congress found it unnecessary to provide a statutory definition of the term to supplant EPA's existing regulatory definition.

On February 12, 1998, EPA promulgated the regulations required under CAA § 301(d)(2). 63 Fed. Reg. 7254; 40 C.F.R. Part 49, App. 50a-134a. Known collectively as the Tribal Authority Rule, or TAR, the new regulations were intended by EPA to have broad effect, in three fundamental respects.

First, the Agency construed the "treatment as States" provisions of the 1990 CAA Amendments as constituting an "express delegation" by Congress to "address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a

reservation." 63 Fed. Reg. 7254, App. 54a. EPA discerned this "express delegation" in the language of CAA § 301(d)(2)(B). In EPA's view, the "most plausible reading of the phrase 'within . . . the reservation or other areas within the tribe's jurisdiction' is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without requiring the tribe to demonstrate its own jurisdiction," but to "require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program." 63 Fed. Reg. 7255, App. 56a.

Second, EPA defined "Indian Reservation," for purposes of the TAR, as the Agency viewed that term as being defined in the "Indian country" statute. *Compare* 40 C.F.R. § 49.2(b), App. 121a, *with* 18 U.S.C. § 1151(a). The Agency explained that, under this definition, "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation" would be considered as "reservation" land for CAA purposes. 63 Fed. Reg. 7258, App. 67a. As a consequence, tribes would be authorized not only to develop TIPs that covered these off-reservation trust lands, but also to redesignate such lands under CAA § 164(c), even though they had never been established as reservation lands by "Treaty, Agreement, Executive Order, or Act of Congress."

Third, EPA construed the "treatment as States" provisions as authorizing it to promulgate regulations that allowed tribes to exercise authority not only over reservation lands, but also to "develop and implement tribal air quality programs in non-reservation areas that are determined" by EPA as being "within the tribe's jurisdiction." 63 Fed. Reg. 7258, App. 70a. In other words, under the TAR, a tribe would be permitted to adopt TIPs and make CAA § 164(c) redesignations for lands located *outside* the exterior boundaries of reservations, upon the tribe's demonstrating "inherent" jurisdiction over such lands under the "second exception" to *Montana*.

On review, the D.C. Circuit upheld the TAR. A *majority of the panel (Judges Edwards and Rogers)* agreed with EPA that the language of CAA § 301(d)(2)(B) constituted an "express delegation" of authority from Congress to tribes of the authority to regulate air quality over all lands within the exterior boundaries of reservations, including non-Indian fee lands. 211 F.3d at 1288-92, App. 11a-21a.[8]

Further, the panel upheld EPA's definition of "reservation" to include off-reservation IRA trust lands. The panel, noting that "reservation" was not an expressly defined term under the CAA, ignoring the legislative and regulatory history of the term under the Act, and relying on the dictionary alone, determined that the term "surely encompasses both trust lands and formally designated reservations." 211 F.3d at 1293, App. 23a. From this, the panel concluded, based on this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and follow-on decisions by lower courts, that is could not "condemn as unreasonable EPA's interpretation" of "reservation" to include off-reservation trust lands. 211 F.3d at 1294, App. 25a-26a.

Finally, the panel upheld EPA's reading of the CAA as allowing tribes to adopt TIPs, and make CAA § 164(c) redesignations, for those lands located *outside* the exterior boundaries of reservations over which the tribes could demonstrate jurisdiction. Rejecting petitioners' claim that

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[8] Dissenting from this portion of the opinion, Judge Ginsburg rejected the majority's finding of an "express delegation" in CAA § 301(d)(2)(B), pointing instead to the language of CAA § 110(o) as constituting such a delegation, but only with respect to tribes' authority to adopt TIPs that covered all lands, including non-Indian fee lands, within the exterior boundaries of reservations. Judge Ginsburg found no express delegation as to other CAA programs. 211 F.3d at 1300-05, App. 38a-48a.

both CAA §§ 110(o) and 164(c), by their plain terms, imposed geographical limitations on the scope of tribal authority, the panel found EPA's reading of the Act to be "undoubtedly" reasonable. 211 F.3d at 1295, App. 26a-28a.

The D.C. Circuit subsequently denied petitions for panel and *en banc* rehearing. App. 135a-138a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision affirms a legislative rule that will govern all future approvals of tribal redesignations and TIP programs under the CAA. Under the judicial review structure of the CAA, no future conflict in the federal Circuits on the questions presented in this petition could be created.[9] Accordingly, this is the only opportunity for this Court to resolve the important questions presented in this petition.

The D.C. Circuit's decision has occasioned an unlikely convergence of two remarkable, and heretofore unrelated, provisions of federal law. The consequences of this convergence, which profoundly alters the balance of sovereign authority between states and tribes with respect to lands within their respective jurisdictions, provide compelling reasons for granting this petition.

The first of these provisions is CAA § 164, which permits both the states and the tribes, in the exercise of absolute discretion, to redesignate their lands to a more stringent air quality classification. Redesignation can restrict the level of growth and development in not only the area redesignated to Class I, but also in lands many miles distant

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[9] Under CAA § 307(b)(1), the D.C. Circuit has exclusive jurisdiction to review legislative rules of national applicability like the TAR. As a result, no other court of appeals can pass on the validity of the TAR, or question the interpretations of the CAA contained therein.

from the redesignated area, *including lands of another sovereign that borders the redesignated lands.*

Second is IRA § 5, which authorizes the U.S. Secretary of the Interior, through administrative action subject to neither the review nor the approval of Congress, to acquire lands and hold them in trust for the benefit of an Indian tribe. By defining "reservation" to include such trust lands located outside the boundaries of reservations formally established by treaty, Executive Order, or Act of Congress, EPA has effectively stripped from the states the authority they previously possessed to redesignate these off-reservation lands. At the same time, tribes are now permitted to redesignate those lands. The radical result is to allow tribes the unilateral authority to constrain, if not stop altogether, growth and development by non-Indians in lands under state jurisdiction miles distant from tribal lands.

By upholding EPA's decision to construe "reservation" lands as including trust lands under the IRA, which can exist in small pockets interspersed with non-Indian lands and which are proliferating each year, the D.C. Circuit has handed to tribes an extraordinary and ever-increasing power over non-Indians on non-tribal lands. This is unprecedented in law.

The decision below also works to divest states of their authority over territory previously within their sovereign jurisdiction by construing the "treatment as states" provisions of the 1990 CAA Amendments as constituting a rare express delegation of authority to tribes over reservation lands held in fee by non-Indians. This ruling too raises a significant issue of tribal authority over non-Indian activity. It ignores the express terms of the CAA, providing that the Act can never be construed as taking from the states their sovereign authority to regulate air quality within their own borders.

I. Certiorari Should Be Granted to Determine Whether EPA Has Discretion to Construe the CAA to Give Tribes Authority to Expand the Lands Over Which They May Exercise Redesignation Power With Extraterritorial Effect, and to Resolve a Split in the Circuits Regarding This Issue.

The authority that the CAA grants to states and tribes to redesignate clean air areas within their respective jurisdictions to Class I is already a remarkable one. Redesignation of an area to Class I can automatically preclude any economic development not only within the area that has been redesignated, but also within lands located miles distant from that area.[10] Under EPA regulations and guidance implementing CAA § 165, EPA has recognized that new or existing major sources located as far as 100 kilometers (approximately 62 miles) from the outer boundary of a Class I area may affect the Class I increments.[11]

Redesignation thus affords both states and tribes extraterritorial jurisdiction to effect control over activities – including the construction of new pollution-generating facilities and the continued operation of such facilities

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[10] *See, e.g., Kerr-McGee Chemical Corp. v. U.S. Dep't of Interior*, 709 F.2d 597, 599 n.1 (9th Cir. 1983).

[11] *See, e.g.*, 40 C.F.R. § 52.21(p); EPA New Source Review Workshop Manual, October 1990, at E.16 ("The meaning of the term 'may affect' [in CAA § 165(d)] is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class I area."). EPA has more recently proposed that permit information received from sources proposing to locate or to construct a major source modification up to 250 kilometers (155 miles) away, be input into a database which can then be accessed by a Class I tribal air quality manager. *See* 61 Fed. Reg. 38,287-288 (July 23, 1996).

already in existence – occurring great distances *outside* the states' and *outside* the tribes' respective jurisdictions. There is perhaps no other provision of federal law that allows sovereigns to wield extraterritorial power without any substantive standards to guide the exercise of that power.

As it happens, in the over 20 years they have had the power to do so under CAA § 164(a), no state has chosen to redesignate any portion of the lands within its borders. Tribes, on the other hand, have not been as reticent. Since 1977, six tribes have sought redesignation of their lands to Class I. In all but the most recent case, discussed below, the lands for which the tribe at issue sought redesignation were indisputably lands within the boundaries of a reservation established by treaty, Executive Order, or Act of Congress.[12]

Under the decision below, however, any parcel of land acquired by a tribe and taken into trust by the Secretary of the Interior pursuant to IRA § 5 will now be considered "reservation" land that, at the absolute discretion of the tribe, can be redesignated to Class I. This is true even for parcels located nowhere near a formal reservation. Further, regulated facilities located many miles from such redesignated trust lands, including facilities owned by non-Indians located on lands under state jurisdiction, could be forced to change the nature or scope of their operations, install prohibitively-expensive pollution controls, or even shut down, if air quality modeling indicates that this is necessary in order to protect the Class I increments for the tribe's redesignated trust land.

Consequently, this process affords tribal governments unbridled ability to impose Class I standards affecting vast areas of a sovereign state, even over that state's objection. As a result, state-planned growth in geographic areas under sovereign state jurisdiction could be restricted or prohibited

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[12] *See generally* Ann Juliano, *Redesignating Tribal Trust Land under Section 164(c) of the Clean Air Act*, 35 Tulsa L.J. 37 (Fall 1999).

altogether. The development and implementation of urban and industrial land use policy by state and local governments, which have not only the authority but the duty to manage their respective state and local resources, would be undermined.

Unless this Court intervenes, states will be powerless to do anything about this geographic expansion and exercise of tribal authority. Tribes can buy up lands available for sale on the open market, and states cannot preclude the Secretary of the Interior from taking such lands into trust pursuant to IRA § 5. Under the IRA, the Secretary's decision is effectively committed to his discretion, as the Eighth Circuit recognized in *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated* 519 U.S. 919 (1996). And once the tribe proposes to redesignate a parcel, EPA *must* approve the request, if the tribe's proposal otherwise meets certain procedural requirements. CAA § 164(b)(2), App. 144a.

These are among the consequences that stem directly from the D.C. Circuit's twin findings that, as used in the CAA, the term "reservation" was ambiguous, and that EPA's new regulatory definition was a "reasonable" exercise of the Agency's rulemaking authority under the second prong of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In both respects, the court erred.

To begin with, the D.C. Circuit failed to discern any specific congressional intent with respect to the term "reservation" in the CAA only because the court made no real effort to look for it. The court's analysis, under the first prong of *Chevron*, consisted of little more than a determination that "reservation" was not an expressly defined term under the CAA. Finding no statutory definition, the court relied on the dictionary, rather than the relevant legislative and regulatory history of the term under the CAA, in concluding that the term, as used in the Act, was ambiguous. App. 22a-24a.

It is not the dictionary, however, that determines whether "reservation," as used in the CAA, is ambiguous. Under *Chevron*, the inquiry must focus on Congress's – not Webster's – understanding of the term. Far from creating an "ambiguity" as to the term's meaning, the absence of a specific definition of "reservation" in the CAA in fact reflects congressional recognition of how the term has historically been understood: *i.e.*, territory set apart for the benefit of tribes by treaty, Executive Order, or Act of Congress. *See* pp. 6-7 & n. 6, *supra*.

When it first used the term "reservation" in the 1977 Amendments, Congress was aware that EPA had previously defined the term in its 1974 PSD regulations to mean lands set apart by treaty, Executive Order, or Act of Congress. The legislative history of the 1977 Amendments confirms that Congress was neither enlarging nor diminishing the lands that tribes could redesignate. For instance, during debate in the House over the Conference Report, the floor manager explained that, in codifying the then-existing regulatory program, the "conference bill provides that both States and Indian tribes *will continue to have the power they now have* to redesignate their lands to a new air quality classification." *See* House Consideration of H. Res. 733 *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT OF 1977, Vol. 3 at 326 (Aug. 4, 1977) (emphasis added).

Moreover, EPA retained the 1974 regulatory definition of "Indian reservation" following enactment of the 1977 Amendments. Had Congress disagreed with EPA's decision to so define the scope of tribal redesignation authority, it would have so indicated at the time it used the term "reservation" in enacting the "treatment as states" provisions in 1990. It did not do so.

The D.C. Circuit's finding that Congress had no discernible intent with respect to its use of the term "reservation" in the CAA is tantamount to its concluding that Congress gave EPA *discretion* to determine what lands tribes

could redesignate, even though redesignation allows tribes to control the activities of non-Indians on non-Indian lands. Petitioners are unaware of any prior instance in which a court has permitted the demarcation of state and tribal jurisdiction over non-Indians to be delegated to a federal administrative agency. Indeed, given the presumption under federal Indian jurisprudence that, absent a clear expression of congressional intent, tribes have no jurisdiction over the activities of non-Indians on non-Indian lands located *within* reservation boundaries, the court's conclusion that EPA has discretion to determine the scope of the boundaries themselves – and then to allow for tribal regulation outside of those boundaries – is a striking result.[13]

Even assuming that EPA could be said to have some discretion to define "reservation" for CAA purposes, the D.C. Circuit was still wrong when it found that EPA could "reasonably" interpret the term to include off-reservation lands taken into trust pursuant to IRA § 5. In light of the extraordinary extraterritorial effects attendant to a tribe's exercise of its authority to redesignate reservation lands to Class I under the CAA, and the implications which redesignation has with respect to the activities of non-Indians on non-Indian lands, EPA's construction of the term "reservation" to include lands which have been, or which one day might be, taken into trust through the exercise of

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[13] If this result is striking, then the D.C. Circuit's further conclusion that tribes are authorized by the "treatment as states" provisions to redesignate lands located *outside* reservation boundaries is inexplicable. According to the court, all that CAA § 164(c) "establishes . . . is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in non-reservation areas." 211 F.3d at 1295, App. 27a. What the court overlooks, however, is that CAA § 164(a) unambiguously reserves to the states the exclusive authority to redesignate all lands other than reservation lands.

unreviewable discretion by the Secretary of the Interior raises serious constitutional problems. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574-75 (1988) (*Chevron* deference must give way "where an otherwise acceptable construction of a statute would raise serious constitutional problems.").

The D.C. Circuit spoke approvingly of EPA's having "supported its interpretation of 'reservation' by looking to relevant case law," in particular "Supreme Court precedent holding that there is no relevant distinction between tribal trust land and reservations for the purpose of tribal sovereign immunity." 211 F.3d at 1294, citing *Oklahoma Tax Comm'n v. Citizen Band, Potawatomi*, 498 U.S. 505 (1991); *U.S. v. John*, 437 U.S. 634 (1978), App.25a. But EPA's reliance on these precedents as support for the TAR's definition of "reservation" is misplaced, as is the D.C. Circuit's confidence that cases such as *Potawatomi* and *John* establish the "reasonableness" of EPA's exercise of the "discretion" the Agency supposedly possesses.

In each of three cases in which this Court has opined that trust lands, never formally declared to be "reservations," nonetheless constituted *de facto* or "informal" reservation lands, none of the lands in question were lands that had been taken into trust by the Secretary of the Interior pursuant to IRA § 5. Rather, the trust lands at issue had taken into trust at either the express direction of Congress (*John* and *Potawatomi*) or by treaty (*Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993)).

In other words, like formal reservations, the trust lands at issue in the Supreme Court cases on which EPA and the D.C. Circuit placed such reliance had originally been set apart for the benefit of the tribes in question through direct congressional and Presidential action. *This Court has yet to resolve whether lands that are taken into trust pursuant to administrative action of the Secretary of the Interior under*

§ 5 of the IRA would similarly constitute a de facto or "informal" reservation.

The distinction between (i) lands placed into trust pursuant to treaties, Executive Orders, or specific acts of Congress, and (ii) lands taken into trust by the Secretary of the Interior exercising unreviewable authority under IRA § 5 is critically important to the case at hand. It is one thing for Congress to extend to tribes under the CAA the authority to redesignate lands previously set aside for their benefit pursuant to action by Congress and the President, action for which there is direct political accountability. It is another thing for Congress to establish an elastic redesignation power under which the lands that can be redesignated by tribes may be expanded without limitation through actions of the Secretary of the Interior that are committed to his discretion.

Given that "treaty reservations" and "Executive Order reservations" were all created before the 1977 CAA Amendments (*see* note 6, *supra*), Congress, by restricting tribal redesignations to lands within reservations established by Act of Congress, treaty, or Executive Order, ensured that the lands that states could redesignate, and the lands that tribes could redesignate, were specifically identified at the time the CAA was amended in 1977, and that those lands could not be changed except by further act of Congress. Where new reservations might be established after 1977 through act of Congress, concerns over the redesignation of those new reservations could be addressed in conjunction with the legislative process itself.

It is an altogether different matter, however, to construe the CAA as authorizing tribes to redesignate off-reservation lands taken into trust under IRA § 5. There being no constraints on the discretion of the Secretary of the Interior to take lands into trust, there would be no check on the tribes' gaining ever-expanding power over the activities of non-Indians on non-Indian lands. Review by this Court of this expansion of tribal jurisdiction to redesignate outside

established formal reservations is thus imperative, if a constitutionally-sound balance between state and tribal authority under the CAA is to be restored.

Finally, review is necessary to resolve the conflict created by the D.C. Circuit's holding with the prior decision of the U.S. Court of Appeals for the Ninth Circuit in *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (1999). In *Arizona v. EPA*, the Ninth Circuit addressed a challenge to the decision by EPA to approve the redesignation to Class I of five parcels of land by the Yavapai-Apache Tribe. Among other things, the petitioners in that case argued that four of the parcels in question, while held in trust by the U.S. government for the benefit of the Tribe, did not constitute lands within the exterior boundaries of a "reservation" within the meaning of CAA § 164(c).

In response to this argument, the Ninth Circuit found that there was "insufficient evidence in the record to support a finding that these parcels have been declared to be reservations by Act of Congress," or that the parcels "have been added to the Middle Verde reservation [*i.e.*, the one parcel which, the petitioners had conceded, was a formally-established "reservation"] by proclamation of the Secretary of the Interior pursuant to the Indian Reorganization Act." *Arizona*, 151 F.3d at 1210-11. The court thus rejected EPA's position that the trust status of the parcels *alone* was sufficient for their being considered "reservation" lands under the CAA. Accordingly, the court remanded to EPA to "determine whether the parcels are reservations for purposes of 42 U.S.C. § 7474(c)," should the Agency re-promulgate its redesignation decision (which had been rejected by the court on other grounds). *Id.* at 1211, *as amended,* 170 F.3d at 870.

Although Petitioners here had directed the D.C. Circuit's attention to the Ninth Circuit's decision in *Arizona v. EPA*, the D.C. Circuit failed even to acknowledge the existence of the case. The D.C. Circuit's finding that EPA's definition of "reservation" was a "reasonable" interpretation

of the CAA cannot be reconciled with the Ninth Circuit's determination that trust status alone is insufficient to deem lands located outside the exterior boundaries of formally-established reservations as being "reservations" within the meaning of CAA § 164(c).

II. This Court Should Resolve Whether the CAA Can Be Construed as Delegating to Tribes Authority to Regulate Air Resources on Non-Indian Fee Lands, Given That the CAA Expressly Precludes States Being Divested of Authority Over Lands Otherwise Within Their Jurisdiction.

This case for the first time presents the question whether the language of the CAA speaks with the clarity required by this Court for Congress to delegate to tribes the authority to regulate the conduct of non-Indians on fee lands within reservation boundaries. As the D.C. Circuit itself acknowledged, there have been historically "few examples of congressional delegation of authority to tribes." 211 F.3d at 1288, App. 12a. The uncommon nature of the event, and the resulting displacement of state sovereignty that flows from a judicial determination that Congress has intended to delegate to tribes authority over lands previously within the jurisdiction of a state, provide compelling reasons for this Court to review the D.C. Circuit's determination. This is particularly true given that the plain language of the CAA precludes the Act's being construed in such fashion.

From its inception in 1970, the CAA has never operated to remove from a state the authority that the state might otherwise possess under its own laws to regulate air emissions from sources located within such state. Specifically, CAA §116, entitled "Retention of state authority," provides, in pertinent part, that, except as otherwise provided in certain sections of the Act not relevant here, "*nothing in this [Act] shall preclude or deny* the right of

any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution" (emphasis added).

By its plain terms, this provision precludes the "treatment as states" provisions from constituting an express delegation to tribes of regulatory authority over non-Indian fee lands within reservation boundaries. To construe the 1990 CAA Amendments as giving tribes authority to regulate on non-Indian fee lands is to find that the Amendments took that same authority *away* from those states that previously exercised jurisdiction over such lands. The Act cannot be so construed, as CAA § 116 makes clear.

Even if CAA §116 did not itself preclude the interpretation which EPA, and the D.C. Circuit, have given to the "treatment of states" provisions, the conclusion that those provisions constitute an "express delegation" cannot be supported. In the first place, it is no small irony that the CAA does not even treat *states* in the manner in which the TAR treats tribes "as states." That is, the Act has never been understood as granting to states regulatory authority over sources within their boundaries that states could not otherwise regulate under state law.[14] The D.C. Circuit never explained how, in light of this, a statutory provision by which Congress affords EPA discretion to treat tribes "as states" can possibly be read as giving tribes authority they otherwise lack.

Moreover, the specific language of the "treatment as states" provisions in which the panel majority pinpointed the

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[14] Rather, in those circumstances where a state cannot, pursuant to state law, adopt a regulatory program that meets the Act's requirements, EPA will refuse to approve that program and will itself adopt an Agency-administered program in its place. *See* CAA §§ 110(c); 110(a)(2)(E) (program must be enforceable under state law).

supposed "express delegation" simply does not support that conclusion, as Judge Ginsburg in his dissent succinctly explained. 211 F.2d at 1302-04, App. 43a-48a. According to Judge Ginsburg, there "is *no way* to read the phrase deemed crucial" by the panel majority "as an express delegation." *Id.* at 1302 (emphasis added), App. 44a.

It is not often that a federal statute is construed as expressly delegating authority to tribes, thereby divesting states of authority over lands previously within their jurisdiction. Where, as here, that rare result has been reached by a panel of the U.S. Court of Appeals which could not even reach agreement as to how Congress supposedly effectuated that result, there is a compelling need for this Court's review.

Finally, underscoring the importance of review, the Ninth Circuit, in recently establishing what it terms a "clear statement rule" for ascertaining whether a statute expressly delegates authority to tribes, has explicitly adopted the reasoning employed by Judge Ginsburg in his dissent. The significance of the Ninth Circuit's decision lies not only in the fact that it conflicts with the approach taken by the panel majority in *Arizona Public Service Co.*, but that the Ninth Circuit has embraced an approach that is itself subject to misapplication.

In *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 WL 1459373 (9th Cir. (Cal.) Oct. 3, 2000), the Ninth Circuit addressed the question whether the Hoopa-Yurok Settlement Act of 1988 expressly granted to the Hoopa Valley Tribe authority over a particular parcel of reservation land which was owned in fee by a non-Indian. At issue was a statutory provision which the district court had interpreted as constituting a "congressional delegation of authority to the Tribe to exercise" jurisdiction over the land in question. *Id.* at *3. The Ninth Circuit reversed.

In so doing, the Ninth Circuit cited what it termed the "delegations of congressional authority to Indian tribes that have been recognized by the Supreme Court," noting that

each of these other statutory provisions, "employ[ed] the same standard language to achieve delegation," *i.e.* by giving Indian tribes authority over all land within the geographical boundaries of the reservation, "notwithstanding the issuance of any patent." *Id.* at *5. "This recognized delegation language," the Ninth Circuit observed, was "conspicuously absent from the Settlement Act section relied upon by the Tribe." *Id.*

In terms of "evaluating the significance of this omission," the Ninth Circuit continued, it found "highly persuasive the treatment of a similar omission in statutory language" by Judge Ginsburg in his dissent in *Arizona Public Service Co. Bugenig*, *id.* at *6. Taking note that Judge Ginsburg had termed the "notwithstanding the issuance of any patent" proviso the "gold standard" for express delegations, the Ninth Circuit found it "appropriate to adopt in this context a 'clear statement rule.'" *Bugenig*, *id.* at *6, *7. "If Congress uses the 'notwithstanding proviso,'" the Ninth Circuit said, it will find that an "appropriate delegation has been made." *Id.* at *7. Where, on the other hand, the Ninth Circuit concluded, a "tribe claims that some other statutory language represents a conferral of jurisdiction," such alternative language "must, on its face, represent a pellucid delegation of the claimed authority." *Id.*

Applying this "clear statement rule," the Ninth Circuit would disagree with the panel majority in the decision below that the language of CAA § 301(d)(2)(B) constitutes a delegation of authority to tribes. The delegation which the majority found to be "implied" by that provision hardly satisfies the Ninth Circuit's requirement that alternative delegation language be "pellucid."

The Ninth Circuit has failed to appreciate, however, that Judge Ginsburg's own misapplication of the "gold standard" proviso in fact led him to the wrong conclusion regarding the effect of that provision in CAA § 110(o). As was previously noted, the proposition that *any* portion of the

Act delegates to tribes authority they otherwise lack over non-Indian fee lands within the jurisdiction of states is refuted by CAA § 116, which ensures that states retain whatever authority they might possess over such lands.

Judge Ginsburg's flawed account as to the effect of the "notwithstanding" proviso in CAA § 110(o) illustrates the dangers inherent in an automatic application of the Ninth Circuit's newly-minted "clear statement rule." Review by this Court is necessary in order to forestall the Ninth Circuit and other Circuits from reading more into the "notwithstanding" proviso than Congress, in a given statutory context, intended.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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No. ——

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Argued January 27, 2000 Decided May 5, 2000

No. 98-1196

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with
98-1208, 98-1206, 98–1207, 98-1208

On Petitions for Review of an Order of the
Environmental Protection Agency

Thomas Sayre Llewellyn argued the cause for petitioner Arizona Public Service Company. With him on the briefs were *Michael B. Wood* and *George Y. Sugiyama*..

Henry V. Nickel argued the cause for petitioners National Association of Manufacturers, et al. and Intervenors State of Michigan and Central and South West Services, Inc. With him on the briefs were *David S. Harlow, John B. Weldon, Jr., Brian J. Renaud, Jennifer M. Granholm,* Attorney General for the State of Michigan, and *John Fordell Leone,* Assistant Attorney General for the State of Michigan. *Norman W. Fichthorn, Cynthia H. Evans, Roy S. Belden, Janice S. Amundson, Donald D. Skypeck, Harold P. Quinn, Jr.,* and *Thomas L. Casey,* Solicitor General for the State of Michigan, entered appearances.

Thomas A. Lorenzen and *Cynthia A. Drew,* Attorneys, United States Department of Justice, argued the cause for respondent. With them on the briefs were *Lois Schiffer,* Assistant Attorney General, *Anthony F. Guadagno* and *Michael W. Thrift,* Attorneys, United States Environmental Protection Agency.

Jill E. Grant argued the cause for intervenors Gila River Indian Community, et al. With her on the brief were *William W. Quinn* and *Jeanette Wolfley. Reid P. Chambers* entered appearances.

Before: Edwards, *Chief Judge,* Ginsburg and Rogers, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* Edwards.

Opinion concurring in part and dissenting from Part II.A. filed by *Circuit Judge* Ginsburg.

Edwards, *Chief Judge:* In 1990, Congress passed a compendium of amendments to the Clean Air Act ("CAA" or "the Act"). This case concerns those amendments that specifically address the power of Native American nations

(or "tribes") to implement air quality regulations under the Act. Petitioners challenge the Environmental Protection Agency's ("EPA" or "the Agency") regulations, promulgated in 1998, implementing the 1990 Amendments. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81) ("Tribal Authority Rule"). Petitioners' principal contention is that EPA has granted too much authority to tribes.

Petitioners' primary challenges focus on two issues. The first is whether Congress expressly delegated to Native American nations authority to regulate air quality on all land within reservations, including fee land held by private landowners who are not tribe members. The second is whether EPA has properly construed "reservation" to include trust lands and Pueblos.

Petitioners also raise several other challenges to the Tribal Authority Rule. They argue: (1) that EPA violated the Act in authorizing tribes to administer programs affecting non-reservation "allotted lands" and "dependent Indian communities"; (2) that EPA unlawfully declined to accept public comments on applications to regulate by Native American nations; (3) that EPA improperly held that the 1990 Amendments abrogated preexisting contracts under which tribes agreed not to regulate certain privately-held land; and (4) that EPA improperly interpreted the 1990 Amendments to exempt Native American nations from certain of the Act's judicial review requirements.

We find petitioners' challenges to be mostly meritless. We hold that the Agency did not err in finding delegated authority to Native American nations to regulate all land within reservations, including fee land owned by

nonmembers. We also uphold EPA's construction of "reservation" to include trust lands and Pueblos. Likewise, we reject the challenge to the Agency's decision to exempt Native American nations from some of the Act's judicial review requirements. Petitioners' complaint regarding the adequacy of public comment on tribal applications is moot. And petitioners' claim that EPA has abrogated preexisting agreements not to regulate is unripe for review, as is one of petitioners' arguments challenging the Agency's decision on the Act's judicial review requirements.

I. BACKGROUND

A. *Statutory Background*

The Act establishes a framework for a federal-state partnership to regulate air quality. The provisions of the 1990 Amendments under review, fairly read, constitute an attempt by Congress to increase the role of Native American nations in this partnership. There are three areas of regulation under the Act particularly relevant to this case.

First, the Act grants states primary responsibility for assuring that air quality meets national standards. *See* 42 U.S.C. § 7407(a) (1994). States meet this burden by submitting state implementation plans ("SIPs") that "provide[ ] for implementation, maintenance, and enforcement" of these standards. *Id.* § 7410(a)(1) (1994). SIPs must be approved by the Agency before they may be federally enforced. In 1990, § 7410 was amended to authorize Native American nations to submit tribal implementation plans ("TIPs") "applicable to all areas . . . located within the exterior boundaries of the reservation." *Id.* § 7410(o).

Second, the Act permits states and Native American nations to "redesignate" lands pursuant to the Act's Prevention of Significant Deterioration ("PSD") program. *See id.* § 7474(a), (c) (1994). Under the PSD program, land is classified as Class I, II, or III. The land's classification determines the maximum allowable increase over the baseline by which concentrations of sulfur dioxide and other particulate matter shall not be exceeded. *See id.* § 7473 (1994). Land may, under certain circumstances, be redesignated as Class I, II, or III. *See id.* § 7474(a). Since 1977, Native American nations have had authority to redesignate land "within the exterior boundaries of reservations." *Id.* § 7474(c).

Finally, under Title V of the Act, states must develop a comprehensive permitting program applicable to major air pollution sources. *See id.* § 7661a (1994). The Agency must approve the permitting program; if none is approved, EPA must promulgate a permitting program that will be federally enforceable. *See id.* § 7661a(d)(3). One of the requirements for approval is that the program provide for judicial review of permitting actions. *See id.* § 7661a(b)(6), (7). Petitioners claim that the Agency has improperly interpreted the 1990 Amendments to give Native American nations the possibility of exemption from some portions of the judicial review requirements.

Importantly, the 1990 Amendments added language to the Act granting EPA the "author[ity] to treat Indian tribes as States under this chapter," *id.* § 7601(d)(1)(A) (1994), provided tribes meet the following requirements:

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

Id. § 7601(d)(2).

The 1990 Amendments also directed EPA to promulgate regulations "specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States." *Id.* If the Agency "determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible," EPA may announce other ways for the Agency to administer the program "so as to achieve the appropriate purpose." *Id.* § 7601(d)(4).

B. *The Challenged Rule*

On August 25, 1994, EPA proposed rules to implement the 1990 Amendments. *See* Proposed Tribal Authority Rule, 59 Fed. Reg. 43,956 (1994) (proposed Aug. 25, 1994). On February 12, 1998, after receiving and responding to public comments, EPA issued the final Tribal Authority Rule. *See* Tribal Authority Rule, 63 Fed. Reg. at 7254. The Agency first found that the 1990 Amendments constitute a delegation of federal authority to regulate air quality to Native American nations within the boundaries of reservations, regardless of whether the land is owned by the tribes. *See id.* The Agency

read the statute to support this "territorial view of tribal jurisdiction," authorizing a "tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land." *Id.* EPA believed that this "territorial approach . . . best advances rational, sound, air quality management." *Id.* at 7255. Thus, the Agency determined that Congress delegated to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation.

The Act does not define "reservation" for the purposes of tribal regulation. EPA interpreted "reservation" to include "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." *Id.* at 7258. The Agency explained that this interpretation was consistent with the Supreme Court's definition of "reservation" in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498* U.S. 505 (1991). EPA held that it would decide on a case-by-case basis whether other types of land may be considered "reservations" under the Act. *See* Tribal Authority Rule, 63 Fed. Reg. at 7258.

For areas not within a "reservation," the Agency determined that a tribe would be allowed to regulate such areas if the tribe could demonstrate inherent jurisdiction over the particular non-reservation area under general principles of federal Indian law. *See id.* at 7259. This means that tribes may propose air quality regulations in "allotted land" and "dependent Indian communities" provided they can otherwise demonstrate inherent jurisdiction over these areas. Allotted land is land "owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." Felix S. Cohen, Handbook of Federal Indian Law 40 (1982). Dependent Indian

communities include "those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving,' or were not specifically designated a reservation." *Id.* at 38.

Some commenters claimed that the Act precludes tribal regulation in the form of TIPs in non-reservation areas. These parties argued that the section of the Act authorizing TIPs includes a specific provision limiting such regulation within reservations lands. *See 42* U.S.C. § 7410(o) (providing that TIPs "shall become applicable to all areas . . . located within the exterior boundaries of the reservation"). EPA, however, interpreted *"reservation"* in § 7410(o) to be "simply a description of the type of area over which a TIP may apply," and ruled that "the provision was [not] intended to limit the scope of TIPs to reservations." Tribal Authority Rule, 63 Fed. Reg. at 7259. EPA's ruling was informed by § 7601(d)(1) under which the Agency "decided to include most of the provisions of [§ 7410] in the group of provisions for which treatment of tribes in the same manner as a state is appropriate." *Id.*

The final aspect of the Tribal Authority Rule under review relates to the provisions covering judicial review of permitting programs. Title V of the Act authorizes regulating authorities to establish permitting programs for pollution sources. Section 7661a(b)(6) requires the authority to afford "an opportunity for judicial review in State court of the final permit action." 42 U.S.C. § 7661a(b)(6). In its proposed rule, EPA indicated an intention to treat tribes like states with respect to judicial review. *See* Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,972. In its final rule, EPA withdrew this proposal, requiring instead that, for Title V programs, tribes must meet all of the requirements of § 7661a(b)(6) and (7) "except those provisions that specify that review of final

action under the Title V permitting program be 'judicial' and 'in State court.'" Tribal Authority Rule, 63 Fed. Reg. at 7261. EPA adopted this provision in response to concerns over tribal sovereign immunity. *See Id.* Thus, EPA indicated its willingness "to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be bound." *Id.* at 7262.

Petitioner Arizona Public Service Company ("APS") filed a petition for review on April 10, 1998. The remaining petitions for review were filed shortly thereafter; the petitions were subsequently consolidated for consideration by this court.

II. ANALYSIS

Petitioners raise several challenges to EPA's final rule. First, petitioners claim that the 1990 Amendments cannot be interpreted to constitute an express delegation of authority to Native American nations to regulate privately owned fee land located within a reservation. Second, petitioners argue that EPA impermissibly interpreted the word "reservation" to include lands held in trust and Pueblos. Third, petitioners contend that EPA impermissibly interpreted the Act to permit Native American nations to issue TIPs and redesignations for land outside the boundaries of a reservation. Fourth, petitioners assert that EPA has failed to allow public comment on tribal applications to issue regulations under the Act. Fifth, petitioners argue that EPA's interpretation of the 1990 Amendments effectively abrogates preexisting

agreements between tribes and regulated industry. Finally, petitioners contend that EPA's final rule covering judicial review procedures for Title V programs was promulgated with insufficient notice to affected parties and that it rests on an impermissible interpretation of the Act.

We analyze EPA's interpretation of the Act under familiar principles. "Where congressional intent is ambiguous, . . . an agency's interpretation of a statute entrusted to its administration is entitled to deference, so long as it is reasonable." *Shell Oil Co. v. EPA,* 950 F.2d 741, 747 (D.C. Cir. 1992) (per curiam) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984)). Our primary concern under *Chevron* is to ensure that an agency acts within the bounds of congressional delegation. "[A]s long as the agency stays within [Congress'] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Arent v. Shalala,* 70 F.3d 610, 615 (D.C. Cir. 1995).

In evaluating the extent of congressional delegation, a reviewing court first exhausts the traditional tools of statutory construction to determine whether a congressional act admits of plain meaning. *See Bell Atlantic Tel. Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997). If, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Id.* If congressional intent is ambiguous, then we move to the second step of the *Chevron* analysis, and uphold an agency's interpretation if it is reasonable. The reasonableness prong includes an inquiry into whether the agency reasonably filled a gap in the statute left by Congress. *See United Techs. Corp. v. EPA,* 821 F.2d 714, 723 (D.C.

Cir. 1987) (upholding filling of gap that is rational and "not inconsistent" with amendments to the Resource Conservation and Recovery Act of 1976).

A. *Express Delegation of Authority to Native American Nations*

It is undisputed that Native American nations retain significant sovereign power. Native American nations have inherent power to determine forms of tribal government, to determine tribal membership, to make substantive criminal and civil laws governing internal matters, to administer tribal judicial systems, to exclude others from tribal lands, and, to some extent, to exercise civil jurisdiction over nonmembers, including non-Indians. *See* Cohen, Handbook of Federal Indian Law, at 247-53; *Montana v. United* States, 450 U.S. 544, 564 (1981). It is this last category of power that is at issue in the instant case, because petitioners claim that the 1990 Amendments to the Act do not authorize tribes to administer the Act over fee land within a reservation that is owned by nonmembers. As the Supreme Court has held,

> exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564.

There is no doubt that tribes hold "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. For instance, if the behavior of non-Indians on fee lands within the reservation "threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe," the tribe may regulate that activity. *Id.* at 566. To satisfy this standard, however, a tribe must show, on a case-by-case basis, that the disputed activity constitutes a "demonstrably serious" impact that "imperil[s] the political integrity, the economic security, or the health and welfare of the tribe." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408, 431 (1989) (plurality opinion). EPA suggests, not implausibly, that "inherent sovereign power" may apply to tribal regulation under the Act of fee lands within a reservation, *see* Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,598 n.5, but the Agency does not press this argument on appeal. Rather, EPA contends that the 1990 Amendments constitute an express congressional delegation to the tribes of the authority to regulate air quality on fee lands located within the exterior boundaries of a reservation.

"There are few examples of congressional delegation of authority to tribes." Cohen, Handbook of Federal Indian Law, at 253. However, as is the case in any situation in which we are called upon to find congressional intent in construing a contested statute, we start with traditional sources of statutory interpretation, including the statute's text, structure, purpose, and legislative history. *See, e.g., Block v. Community Nutrition Inst.,* 467 U.S. 340, 345 (1984) ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). Our review of the CAA indicates that EPA's interpretation comports with congressional intent.

Section 7601(d), in pertinent part, authorizes EPA to treat otherwise eligible tribes as states if "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B). The statute's clear distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction. Thus, EPA correctly interpreted § 7601(d) to express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation without the need to determine, on a case-specific basis, whether a tribe possesses "inherent sovereign power" under *Montana*.

Petitioners do not dispute that an important purpose of the Act is to ensure *effective* enforcement of clean air standards. Obviously, this is best done by allowing states and tribes to establish uniform standards within their boundaries. As EPA explained in its proposed rule,

> [a]ir pollutants disperse over areas several and sometimes even hundreds of miles from their source of origin, as dictated by the physical and chemical properties of the pollutants at issue and the prevailing winds and other meteorological conditions. The high mobility of air pollutants, resulting areawide effects and the seriousness of such impacts, underscores the undesirability of fragmented air quality management within reservations.

Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,959.

Accepting petitioners' interpretation of the 1990 Amendments would result in a "checkerboard" pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the Act. Indeed, the Supreme Court has condemned such an approach. *See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 479 (1976) (rejecting checkerboard approach in interpreting § 6 of the General Allotment Act, 25 U.S.C. § 349); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 358 (1962) (terming "impractical" a pattern of checkerboard jurisdiction under 18 U.S.C. § 1151).

Finally, we note that the legislative history of the 1990 Amendments supports EPA's interpretation. As originally introduced, 42 U.S.C. § 7601(d) differed in significant respect from the final adopted version. The original § 7601(d)(2)(B) provided that treatment of tribes as states was authorized if "the functions to be exercised by the Indian tribe are *within the area of the tribal government's jurisdiction.*" S. 1630, 101st Cong. § 113(a) (1990), *reprinted in* Senate Comm. On Env't and Pub. Works, 103D Cong., Legislative History of the Clean Air Act Amendments of 1990, at 4283 (1993) (emphasis added); *see also* H.R. 2323, 101st Cong. § 604 (1989), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 4101. The statute as finally enacted, however, treats tribes and states as equivalent if the tribe is to exercise functions "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B).

Thus, Congress moved from authorizing tribal regulation over the areas "within the tribal government's jurisdiction" (an admittedly general category) to a bifurcated classification

of all areas within "the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction." This change strongly suggests that Congress viewed all areas within "the exterior boundaries of the reservation" to be "within the area of the tribal government's jurisdiction." The change also indicates that Congress knew how to draft the 1990 Amendments to support petitioners' interpretation. The fact that Congress specifically rejected language favorable to petitioners' position and enacted instead language that is consistent with EPA's interpretation only strengthens our conclusion that the Agency has correctly ascertained Congress' intent in passing the 1990 Amendments.

The dissent's contrary contentions regarding the meaning of the 1990 Amendments do not cause us to question this conclusion. The dissent's argument that Congress would not use a "never-before-attempted" formulation to accomplish an express delegation when it could use the "formulaic 'notwithstanding' proviso [used in § 7410(o)]—the gold standard for such delegations," cannot carry much weight. Dissent Op. at 5-6. That a provision uses a new formulation is not dispositive of the question as to whether it constitutes an express delegation. Indeed, it is noteworthy that, in construing 33 U.S.C. § 1337(h)(1), which uses the dissent's so-called "gold standard," EPA has declined to find an express delegation in such language. We can assume that Congress was aware of EPA's contemporaneous interpretation of the Clean Water Act, first proposed in 1989 (while Congress contemplated the 1990 Amendments). *See* Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,101 (1989) (proposed Sept. 22, 1989) (to be codified at 40 C.F.R. pt. 131) ("EPA may treat an Indian Tribe as a State . . . only where the Tribe already possesses and can adequately demonstrate authority to manage and

protect water resources within the borders of the reservation. The Clean Water Act . . . does not grant additional authority to Tribes."). Thus, Congress' failure to use the same language in § 7601(d) does not at all imply that it meant to avoid delegation to the tribes; rather, it may suggest just the opposite.

The dissent's argument resting on Congress' omission of a "literal delegation" to tribes is seductive, but, ultimately, also unconvincing. It is true that, as originally introduced, the bills in the Senate and the House contained language providing that "the Administrator . . . may delegate to [ ] tribes [that the Administrator is authorized to treat as States] primary responsibility for assuring air quality and enforcement of air pollution control." H.R. 2323, 101st Cong. § 604 (1989), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 4101. The absence of this language from the final bill, however, does not compel the dissent's conclusion that Congress "specifically rejected" language favorable to EPA's position. Neither the majority nor the dissent can call upon determinative legislative history to illuminate the motivations behind this unexplained change to the provisions at issue. We suggest, however, that there are at least two other explanations that account for the absence of the cited language from the final bill. First, Congress simply may have deemed the language to be redundant and confusing in light of § 7601(d)(2)(B). It would have been redundant because § 7601(d)(2)(B) already accomplishes an express delegation. It would have been confusing because the omitted language can be read to apply to areas both outside and inside the boundaries of the reservation, and, as we hold, Congress intended to expressly delegate only with respect to areas within the boundaries of a reservation.

Second, the language contained in the original bills hardly represents, as the dissent declares *ipse dixit,* a "literal delegation." Providing that the "Administrator . . . may delegate" authority to tribes reads less like an express delegation from Congress to the tribes than a permissive instruction to the Administrator. Moreover, the omitted language did not expressly expand tribal jurisdiction to include those areas within the boundaries of a reservation owned by non-members—which is what is necessary for express delegation—as does the language in the adopted § 7601(d)(2)(B). In other words, the language used in the progenitors to § 7601(d) that the dissent claims is a "literal delegation" is not easily manipulated to fit the contours of the traditional express delegation inquiry. We also note, as an aside, that by treating the original bills' language as an express delegation, our colleague seemingly abandons the "gold standard" that he claims Congress consistently has utilized expressly to delegate authority to Indian tribes. In short, we take more from the language used in the adopted § 7601(d)(2)(B) than from the language omitted.

What little precedent there is addressing express delegations of authority to Native American nations in other contexts supports our interpretation of § 7601(d). In *United States v. Mazurie,* the Supreme Court reviewed 18 U.S.C. § 1161 and concluded that the statute was an express delegation to tribes of the authority to regulate alcohol transactions. 419 U.S. 544, 556-57 (1975). The Court reaffirmed this holding almost a decade later. *See Rice v. Rehner,* 463 U.S. 713, 728-29 (1983). Section 1161 provides in pertinent part that various federal liquor laws applicable to transactions within Indian country shall not apply

> within any area of Indian country provided such act or transaction is in conformity both with the laws of the

> State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161 (1994). The Court read this language to make

> clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area.

Rehner, 463 U.S. at 728-29.

The decisions in *Mazurie* and *Rehner are* significant because the Court found an express delegation despite the absence of any "we hereby delegate" language in the statute. The Court did not find any precise language of delegation in the disputed statute, but, rather, rested on the implication inherent in recognizing the power of tribes to adopt an ordinance pertinent to liquor transactions on Indian country. *See Rehner, 463* U.S. at 730-31. Similarly, in this case, we find an express congressional delegation from the implication inherent in the distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction."

Petitioners claim that the 1990 Amendments delegate authority to EPA to approve state or tribal air quality programs for federal enforcement, not authority to tribes to "adopt regulatory programs that the tribes could not adopt

under tribal and federal Indian law prior to the 1990 Amendments." Br. for Petitioners National Ass'n of Mfrs. ("NAM") at 23. Petitioners' claim misses a crucial point, however, that there are two different powers at issue here: (1) the authority to regulate and (2) the derivative authority to enforce specific provisions of the Act. Petitioners focus on the derivative authority. Of course the 1990 Amendments do not constitute an express delegation to the tribes to enact regulatory provisions absent any federal oversight or approval. Rather, the 1990 Amendments simply establish the palette with which tribes are permitted to paint their regulatory picture.

Petitioners additionally argue that although states are authorized under 42 U.S.C. § 7407(a) to enact programs "within the entire geographic area comprising such State," EPA has never interpreted this provision as allowing states to promulgate air quality regulations applicable to Native American reservations located within a state's geographic area. In other words, petitioners claim that because states may not promulgate regulations affecting Native American reservations, tribes may not promulgate regulations covering lands held in fee by persons other than tribal members. This argument is obviously flawed, because it fails to recognize that the relationship between fee holders and tribes is quite different from the relationship between tribes and states. As the Supreme Court noted in *Mazurie*,

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are "a separate people" possessing "the power of regulating their internal and social relations . . . ."

419 U.S. at 557 (citations omitted). And there is no doubt

that Congress may delegate authority to tribes "even though the lands [are] held in fee by non-Indians, and even though the persons regulated [are] non-Indians." *Id.* at 554.

Finally, petitioners note that the Agency declined to find an express delegation of power to regulate fee lands under §§ 518(e) and (h) of the Clean Water Act; this is noteworthy to petitioners, because they can glean no difference between the cited provisions under the Clean Water Act and the disputed provisions in this case under the Clean Air Act. We find no merit in this argument. The Clean Water Act states that "[t]he Administrator is authorized to treat an Indian tribe as a State . . . if . . . the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe . . . within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (1994). "Reservation" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." *Id.* § 1377(h)(1). In construing these provisions, EPA concluded that because the legislative history was "ambiguous and inconclusive," it would not find that the Clean Water Act expanded or limited the scope of tribal authority beyond that inherent in the tribe. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (1991) (codified at 40 C.F.R. pt. 131).

The situation here is quite different from what EPA found with respect to the Clean Water Act. Although the disputed language in the Clean Air Act and the Clean Water Act is somewhat similar, it is far from identical. As noted above, EPA correctly relied on the CAA's clear distinction between areas "within the exterior boundaries of the reservation" and

"other areas within the tribe's jurisdiction" to find a congressional intention to define the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction. Furthermore, as we have already indicated, the legislative history of the 1990 Amendments plainly supports EPA's interpretation. Thus, the legislative history underlying the Clean Air Act is not "ambiguous and inconclusive," as was found to be the case with respect to the Clean Water Act.

It is also of some significance that EPA's interpretation of the Clean Water Act never has been subject to judicial review on the question of the presence or absence of an express delegation to tribes to regulate fee lands within the bounds of reservations. One federal court has observed, in *dicta*, that "the statutory language [in the Clean Water Act] seems to indicate plainly that Congress did intend to delegate . . . authority to tribes." *State of Montana v. EPA*, 941 F. Supp. 945, 951 (D. Mont. 1996). The court noted, however, that in construing the provisions of the Clean Water Act, "EPA determined that it would take the more cautious view, that Congress did not expressly delegate jurisdiction to tribes over non-Indians and that tribes would have to prove on a case-by-case basis that they possess such jurisdiction." *Id.* at 952. There was no reason for EPA to take a similarly "cautious view" with respect to the Clean Air Act, because the language and legislative history of the 1990 Amendments differ from that of the Clean Water Act.

B. *EPA's Interpretation of "Reservation"*

Given that EPA correctly interpreted § 7601(d) to expressly delegate jurisdiction to otherwise eligible tribes over all land within the exterior boundaries of reservations, including fee land, the next question is what areas are

covered by a "reservation." EPA interprets "reservation" as used in three different statutory provisions (42 U.S.C. §§ 7410(o), 7474(c), 7601(d)(2)(B)) to mean formally designated reservations as well as "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." Tribal Authority Rule, 63 Fed. Reg. at 7258. This includes what EPA terms "Pueblos" and tribal trust land. Pueblos are villages, primarily located in New Mexico, held by tribes in communal fee-simple ownership, originally acquired under grants from Spain and Mexico, and confirmed by Congress in the late 1800s. *See United States v. Sandoval*, 231 U.S. 28, 38-39 (1913). Petitioners ignore the status of Pueblos and concentrate their attack on EPA's interpretation of "reservation" to include tribal trust land.

The Secretary of the Interior is authorized to acquire land in trust for a tribe under 25 U.S.C. § 465 (1994), and such land can only formally be designated a reservation via the process provided by 25 U.S.C. § 467 (1994). Petitioners claim that EPA's interpretation contravenes the Act's plain language and renders 25 U.S.C. § 467 superfluous by ignoring the distinction between "trust lands" and "reservations." EPA counters that the statute is ambiguous, and that its reasonable interpretation is entitled to *Chevron* deference.

We start with *Chevron* step one and rely on traditional principles of statutory construction to determine whether EPA's interpretation contravenes congressional intent as manifested by the 1990 Amendments. Significantly, the Act nowhere defines "reservation." Therefore, we look to the term's ordinary and natural meaning, and the context in which the term is used. *See Smith v. United States*, 508 U.S. 223, 228-30 (1993). And we must remain cognizant of the

rule that courts construe federal statutes liberally to benefit Native American nations. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

The dictionary defines "reservation" to be a "tract of public land set aside for a particular purpose (as schools, forest, or the use of Indians)." WEBSTER'S THIRD NEW INT'L DICTIONARY 1930 (1993). This definition surely encompasses both trust lands and formally designated reservations. Nothing in the United States Code is clearly to the contrary, for the term "reservation" has no rigid meaning as suggested by petitioners. *See* 7 U.S.C. § 1985(e)(1)(A)(ii) (Supp. IV 1998) (defining "reservation" to include land "within the limits of any Indian reservation under the jurisdiction of the United States, . . . trust or restricted land located within the boundaries of a former reservation of a federally recognized Indian tribe in the State of Oklahoma[,] . . . [and] all Indian allotments the Indian titles to which have not been extinguished if such allotments are subject to the jurisdiction of a federally recognized Indian tribe"); *id.* § 2012(j) (1994) (defining "reservation" as "the geographically defined area or areas over which a tribal organization . . . exercises governmental jurisdiction"); 25 U.S.C. § 1452(d) (1994) (defining "reservation" to include Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act); *id.* § 1903(10) (1994) (defining "reservation" to be "Indian country as defined in section 1151 of Title 18" and any trust land not encompassed by § 1151); *id.* § 3103(12) (1994) ("'[R]eservation' includes Indian reservations established pursuant to treaties, Acts of Congress or Executive orders, public domain Indian allotments, and former Indian reservations in Oklahoma"); 33

U.S.C. § 1377(h)(1) (defining "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation").

These varying definitions of "reservation" lay to waste petitioners' argument. Petitioners appear to assert that, in the absence of any specific definition, "reservation" as used in the 1990 Amendments to the Act can only mean the formal reservation contemplated by 25 U.S.C. § 467. This is a specious contention. First, § 467 does not purport to offer an exclusive definition of "reservation"; it simply defines the terms under which federal land is formally designated a reservation. Second, if Congress had wanted to limit the term "reservation" as petitioners suggest, Congress could have done so. Indeed, Congress on many occasions has defined "reservation" in terms of other statutes. *See* 12 U.S.C. § 4702(11) (1994) (defining "reservation" according to 25 U.S.C. § 1903(10)); 22 U.S.C. § 2124c(m)(1) (1994) (defining "Indian reservation" with reference to 25 U.S.C. § 1452(d)); 25 U.S.C. § 1903(10) (defining "reservation" with reference to 18 U.S.C. § 1151, as well as trust land); 26 U.S.C. § 168(j)(6) (1994 & Supp. III 1997) (defining "Indian reservation" with reference to 25 U.S.C. § 1452(d) and 25 U.S.C. § 1903(10)); 42 U.S.C. § 10101(19) (1994) (defining "reservation" to include communities referred to in 18 U.S.C. § 1151(a), (b)); *id.* § 11332(a)(1994) (defining "reservation" according to 25 U.S.C. § 1452(d)). Moreover, given the varying definitions of the term used throughout the Code, it would be a curious result indeed for this court to insist that the absence of a definition requires EPA to advance the most restrictive definition as put forth by petitioners.

Aside from the statute's plain meaning and its context, other sources of statutory interpretation offer no insight into congressional intent with respect to the meaning of "reservation." The Report of the Senate Committee on Environment and Public Works refers to the authority of Indian tribes to "administer and enforce the Clean Air Act in Indian lands," as well as enforcement of the Act in "Indian country." S. REP. No. 101-228, at 79, 80 (1989), *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS of 1990, at 8419-20. These terms are arguably broader than the definition of "reservation" urged by petitioners, and simply confirm the term's ambiguity as used by Congress.

Accordingly, we turn to step two of the *Chevron* inquiry. That is, did the Agency reasonably interpret the term "reservation" to include formal reservations, Pueblos, and trust lands? EPA supported its interpretation of "reservation" by looking to relevant case law, in particular Supreme Court precedent holding that there is no relevant distinction between tribal trust land and reservations for the purpose of tribal sovereign immunity. *See Oklahoma Tax Comm'n, 498* U.S. at 511. This view is consonant with other federal court holdings that an Indian reservation includes trust lands. *See United States v. John*, 437 U.S. 634, 649 (1978) (finding "no apparent reason" why lands held in trust should not be considered a "reservation" under § 1151(a)); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000) (same); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (considering tribal trust land to be Indian country under either § 1151(a) as a "*de facto*" reservation or § 1151(b) as a dependent Indian community); *United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985) (holding that trust land is a "reservation" under § 1151(a)).

Petitioners note that, for several years, EPA has defined reservation, for the purposes of the PSD program, to be "any federally recognized reservation established by Treaty, Agreement, executive order, or act of Congress." 40 C.F.R. 52.21(b)(27) (1999). Given the Agency's reasoned justification for a broader definition of "reservation" in the Tribal Authority Rule, and its proposal to amend the PSD definition to ensure consistency with the Tribal Authority Rule, EPA's departure from the PSD definition does not preclude this court from upholding EPA's new definition. In light of the ample precedent treating trust land as reservation land in other contexts, and the canon of statutory interpretation calling for statutes to be interpreted favorably towards Native American nations, we cannot condemn as unreasonable EPA's interpretation of "reservations" to include Pueblos and tribal trust land.

C. *Areas over which Tribes May Exercise Jurisdiction to Propose TIPs and Redesignations*

The next issue that arises in this case is whether EPA defensibly interprets the extent of Native American authority to redesignate geographic areas and propose TIPs under the Act. Native American nations are authorized to redesignate "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes." 42 U.S.C. § 7474(c). Similarly, Indian tribes may submit TIPs "applicable to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o).

EPA interpreted both of these provisions to authorize tribal redesignation and implementation of TIPs not just within the limits of reservations (including trust lands and

Pueblos), but also within allotted lands and dependent Indian communities. No one argues that allotted lands and dependent Indian communities are within the compass of a "reservation." Instead, EPA contends that so long as a tribe demonstrates inherent jurisdiction over non-reservation areas, it may issue redesignations and TIPs for those lands. In other words, although tribes do not have express delegated authority to issue redesignations and TIPs for non-reservation areas, neither does the Act bar tribes from acting on a case-by-case basis pursuant to demonstrated inherent sovereign power.

Petitioners contend that both § 7474(c) and 7410(o) operate as geographical limitations on the power of tribes to redesignate areas and issue TIPs. Petitioners' argument with respect to § 7474(c) falls flat. This provision says that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. § 7474(c). Petitioners seek to twist this language into the following: "Indian tribes may only redesignate lands within the exterior boundaries of reservations." All § 7474(c) establishes, however, is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in non-reservation areas.

Nor do petitioners fare better with respect to § 7410(o), which states that EPA-approved TIPs "shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o). Petitioners read this to mean that EPA may only approve a TIP if it applies within reservation areas.

As EPA points out, petitioners' interpretation cannot stand for several reasons. First, § 7410(o) cross-references § 7601(d), which allows for tribes to exercise jurisdiction over reservation areas or "other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B). Most importantly, § 7410(o) provides that TIPs apply to all areas within the borders of a reservation once the plan "becomes effective in accordance with the regulations promulgated under section 7601(d) of this title." 42 U.S.C. § 7410(o). Therefore, it is permissible for EPA to give § 7410(o) the reading it proffers: a reinforcement of tribes' jurisdiction to implement TIPs in reservation land. Petitioners would instead read the statute as an express limitation of tribal jurisdiction. Under step one of *Chevron*, we cannot say that congressional intent is free of ambiguity on this question.

Accordingly, we turn to whether EPA's interpretation is reasonable. We believe that it is undoubtedly so. To read the statute otherwise would result in several anomalies. First, EPA notes without dispute that petitioners' interpretation would allow a state's implementation plan to apply to non-reservation areas, even where a tribe has demonstrated inherent jurisdiction over those areas. Second, petitioners' reading would disable a tribe from comprehensively administering the Act. A tribe could implement, in non-reservation areas, new source performance standards under the Act, but not administer a TIP, even though the regulated activity "threatens or has some direct effect on the . . . health or welfare of the tribe." *Montana*, 450 U.S. at 566. EPA's reading of the statute to allow such regulation is a reasonable interpretation of §§ 7410(o) and 7601(d).

D. *The Right of The Public To Comment on Tribal Applications to Regulate*

EPA's final rule limited the opportunity of the public to comment directly to the Agency on "competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas," allowing only "appropriate governmental entities" to submit comments. Tribal Authority Rule, 63 Fed. Reg. at 7267. Petitioners challenge this limitation of the public's opportunity to comment directly to EPA. Before this court, however, EPA indicated its intent to clarify that the Agency will accept comments directly from all commenters on the determination of a tribe's eligibility to be treated as a state. *See* Br. for Respondent at 43. Subsequently, EPA issued a clarification to this effect. *See* Indian Tribes: Air Quality Planning and Management, 65 Fed. Reg. 1322, 1323 (2000).

Therefore, this issue is moot. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (finding challenge to EPA's waiver for state's program was moot where actions complained of were revised after lawsuit was filed). A dispute may be rendered moot where the complained of conduct has been voluntarily discontinued if "(1) there is no reasonable expectation that the conduct will recur and (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* at 459 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). In this case, there is no indication that EPA will revert to its past proposal only to receive direct comments from "appropriate governmental units," and all of the adverse effects of the Agency's alleged illegal action have been remedied by EPA's clarification.

E. Abrogation of Existing Agreements By Tribes Not to Regulate Certain Land

Petitioners argue that EPA's final rule abrogates preexisting agreements by Native American nations not to regulate certain individual parties. Specifically, petitioner APS points to its 1960 lease with the Navajo Nation that APS claims prohibits the Nation from regulating the operation of the Four Corners Power Plant. *See* Br. of Petitioner APS at 2. APS further claims that the Secretary of the Interior covenanted to protect APS from tribal regulation. *See id.* at 3.

Petitioners point to footnote 5 in the final rule which states, in response to industry comments that preexisting agreements may limit the extent of a tribe's regulatory jurisdiction, that "EPA believes that the CAA generally would supersede pre-existing treaties or binding agreements that may limit the scope of tribal authority over reservations." Tribal Authority Rule, 63 Fed. Reg. at 7256 n.5. Petitioners ignore the sentence following footnote 5, however, in which EPA states that it "will consider on a *case-by-case* basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation." *Id.* at 7256 (emphasis added). EPA maintains in its brief that it has made no judgment on the scope and effect of the specific agreements to which petitioners refer, and that it will consider such questions as they arise. As counsel for APS acknowledged at oral argument, it is quite possible that the abrogation issue never will arise. For instance, if the Navajo Nation agrees that it will not regulate the Four Corners Plant, there will be no controversy in need of resolution.

There is still a concern, however. In EPA's preamble to a proposed federal implementation plan, promulgated after the Tribal Authority Rule, the Agency stated that,

> [u]pon review of the circumstances surrounding the location and operation of [the Four Corners Power Plant] on the Navajo Indian Reservation, EPA concluded that jurisdiction under the Act over this facility lies with EPA and the Navajo Nation.

64 Fed. Reg. 48,731, 48,732 (1999); *see also* 64 Fed. Reg. 48,725, 48,726 (1999) (taking same position with respect to the Navajo Generating Station). EPA now acknowledges that, to the extent these preambles imply that the Agency has determined that the indicated plants are subject to regulation by the Navajo Nation, these statements were incorrect. *See* Supp. Br. of Respondent at 4. In fact, EPA has confirmed this position by publishing an official notice in the Federal Register clearly indicating that it has not yet determined whether the Navajo Nation may regulate the indicated power plants under the Act. *See id.* at 4-5.

This issue, therefore, is not ripe for review before this court. The ripeness doctrine seeks to balance institutional interests in delaying review against litigants' interests in promptly reviewing allegedly unlawful government actions. *See Florida Power & Light Co. v. EPA,* 145 F.3d 1414, 1420—21 (D.C. Cir. 1998). First a court must ask if the disputed issues are fit for judicial review. *See Abbot Labs. v. Gardner,* 387 U.S. 136, 149 (1967). If the institutional interests of the agency or reviewing court favor postponing review, then a party must demonstrate "hardship" in order to show that the issue should nonetheless be made subject to judicial review. *See City of Houston v. HUD, 24* F.3d 1421, 1431 (D.C. Cir. 1994).

The fitness inquiry asks if a case "'presents a concrete legal dispute [and] no further factual development is essential to clarify the issues . . . [and] there is no doubt whatever that the challenged [agency] practice has "crystallized" sufficiently for purposes of judicial review.'" *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 492-93 (D.C. Cir. 1988)) (alterations in original). Here, petitioners cannot satisfy this prong because EPA has not issued any order relating to the preexisting covenants prohibiting regulation by Native American nations. *See Florida Power & Light*, 145 F.3d at 1421 (finding lack of fitness for review where it was unclear "whether, or on what grounds, EPA would even apply" the challenged rule to petitioners).

Additionally, petitioners cannot point to any hardship they would suffer from deferred judicial review. It is axiomatic that mere delay, absent other extenuating circumstances, in adjudication of a dispute cannot satisfy the hardship prong. *See Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-06 (D.C. Cir. 1998); *Florida Power & Light*, 145 F.3d at 1421 (burden of participating in further proceedings does not constitute a hardship).

Contrary to petitioners' argument, this case is not on all fours with *Better Government Association v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986). In *Better Government*, petitioners challenged Department of Justice regulations applied by the Department of State and the Department of the Interior to evaluate fee waiver applications for Freedom of Information Act requests. The court found that the claim was ripe for review because the departments relied on the Department of Justice guidelines, and the government agreed that the regulations "*govern*[ ] *and will continue to govern* its

decisions." *Id. at* 93. Here, EPA has made no decision that will govern its analysis of whether the preexisting agreements are abrogated by its interpretation of the Act. Until the Agency takes a position on the enforceability of the covenants not to regulate, there is no concrete issue for this court to consider.

F. Judicial Review of Tribal Permitting Programs

Under Title V of the Act, states must develop a comprehensive permitting program applicable to major air pollution sources. *See* 42 U.S.C. § 7661a. Section 7661a enunciates the requirements for administering permitting programs, including elements of judicial review. Pursuant to § 7661a,

> [t]hese elements shall include . . .
>
> (6) Adequate, streamlined, and reasonable procedures for . . . expeditious review of permit actions, . . . including an opportunity for judicial review in State court of the final permit action . . . .
>
> (7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application . . . shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

Id. § 7661a(b)(6), (7).

EPA initially proposed that tribes "will have to meet the same requirements" as states in providing an opportunity for judicial review of a final permit action. Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,972. EPA withdrew this proposal in its final rule. Instead, EPA required tribes to meet all the requirements of § 7661a(b)(6) and (7) except that review of a tribe's Title V permitting program need not be "judicial" or "in State court." *See* Tribal Authority Rule, 63 Fed. Reg. at 7261. Petitioners present two challenges to the final rule on judicial review: (1) that EPA had no authority to exempt tribes from the Act's judicial review requirements; and (2) that interested parties received insufficient notice of the final rule's content.

EPA promulgated its final rule in response to comments that expressed concern over "waivers of tribal sovereign immunity to judicial review." *Id.* Some Native American representatives observed that requiring a waiver of sovereign immunity for a tribe to administer a Title V permit program would operate as a disincentive to a tribe's establishing such programs. Industry commenters also sought assurances that nonmembers of tribes would have access to tribal courts for judicial review.

EPA identified two alternatives for ensuring that "some form of citizen recourse be available for applicants and other persons affected by permits issued under tribal Title V programs." *Id.* One option was for tribes to voluntarily waive their sovereign immunity in tribal courts. A second possibility was for the Agency to consider "alternative options . . . that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be

bound." *Id.* at 7262. EPA interpreted 42 U.S.C. § 7601(d) to "provide[ ] EPA with the discretion to balance the goals of ensuring meaningful opportunities for public participation under the CAA and avoiding undue interference with tribal sovereignty when determining those provisions for which it is appropriate to treat tribes in the same manner as states." *Id.*

Section 7601(d) authorizes EPA to treat Native American nations as states for the purposes of the Act. However, if EPA determines "that the treatment of Indian tribes as identical to states is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. § 7601(d)(4). EPA relies on this statutory provision to justify the approach taken on judicial review.

Petitioners argue that EPA lacks authority to exempt tribes from the judicial review requirements, because § 7601(d) does not affect the operation of CAA provisions "that define rights that must be afforded to those affected by a program in order [for either a tribe or a state] to receive EPA approval to administer a federally enforceable program." Br. for Petitioners NAM at 42. We see no merit in this claim. EPA's interpretation is not clearly contradicted by the statute. In fact, § 7601(d)(4) allows the Agency the discretion to determine whether it is "inappropriate or administratively infeasible" to treat Indian tribes exactly the same as states in administering the Act. Petitioners offer no support for their assertions that the judicial review requirements do not come within the EPA's discretion under this section. It is obvious, then, that the Agency had a choice as to whether to treat Indian tribes identical to states with

regard to the judicial review elements of § 7661a(b). The clear meaning of the statute does not foreclose the Agency's interpretation.

Nor is the Agency's interpretation unreasonable. EPA understandably was concerned that the effect of requiring tribes to submit their permitting disputes to state courts would conflict with policies supporting tribal sovereignty and also discourage the institution of tribal permitting programs. The Agency's decision to allow tribes to submit alternatives to waiving sovereign immunity accomplishes a reasonable balancing of these interests. This is bolstered by EPA's expressed intention to ensure that any alternative to a waiver of sovereign immunity nonetheless provides an impartial forum allowing for "injunctive-type relief." Tribal Authority Rule, 63 Fed. Reg. at 7262.

Petitioners also argue that, assuming that EPA could exempt tribes from judicial review requirements, § 7601(d)(4) requires that EPA provide an alternative means of ensuring effective judicial review. Petitioners suggest that EPA must at least "provide for review by the Regional Administrator of all tribal permit decisions, and resolve all federal or tribal challenges to the tribe's actions." Br. for Petitioners NAM at 44. To the extent that this argument merely reiterates the contention that EPA has no authority to alter tribes' judicial review responsibilities, nothing more need be said. To the extent that this argument challenges the alternative tribal review procedures to be approved by EPA in lieu of judicial review in state court, this issue is not ripe for review. EPA has not yet approved any alternative tribal judicial review procedures. *See* Tribal Authority Rule, 63 Fed. Reg. at 7262 ("EPA will develop guidance in the future on acceptable alternatives to judicial review."). As such,

there is no decision "fit" for judicial review, nor have petitioners demonstrated any hardship from deferred review.

Petitioners advance a separate contention in support of vacating the rule: that interested parties did not receive sufficient notice of the substance of the final rule. The Administrative Procedure Act requires that an agency publish notice of its proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1994). An agency satisfies this notice requirement if the final rule is a "logical outgrowth" of the proposed rule. *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991). In other words, we consider "'whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be imposed'" in determining whether adequate notice was given in a notice of proposed rulemaking. *Id.* at 446 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)) (alterations in original).

"In most cases, if the agency . . . alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Thus, the "logical outgrowth" test normally is applied to consider "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* (emphasis added). In this case, there was more than enough notice for interested parties to offer comments on EPA's treatment of the judicial review provisions of the Act *vis a vis* Indian tribes. The parties were not asked to "divine the EPA's unspoken thoughts." *Shell Oil Co.*, 950 F.2d at 751. And the final rule was not wholly unrelated or surprisingly distant from what EPA initially suggested. In

first proposing that tribes would have to meet the "same requirements" as states, EPA effectively raised the question as to whether this made sense. EPA's proposal was not a "bureaucratic game of hide and seek," *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995); the proposal raised a highly visible and controversial issue and elicited responses from both tribal and industry commenters. Furthermore, any reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments. In short, it is fair to say that the purpose of notice and comment rulemaking has been served, and that the Agency's change of heart on this issue only demonstrates the value of the comments it received.

III. CONCLUSION

Consistent with the foregoing opinion, we deny the petitions for review in part, and dismiss in part for want of jurisdiction and for lack of ripeness. Petitioners' motions for vacatur and remand are dismissed as moot.

* * * *

GINSBURG, *Circuit Judge*, *dissenting in part:* With certain exceptions, of which more later, an Indian tribe lacks inherent authority to regulate the conduct of a nonmember on land he owns within the boundaries of the tribe's reservation. Lacking inherent authority, a tribe may exercise regulatory authority over such non-Indian lands only by express congressional delegation. The court today determines that § 301(d)(2)(B) of the Clean Air Act, 42 U.S.C. § 7601(d)(2)(B), expressly delegates to tribes—contingent upon approval by the EPA Administrator—authority to enforce the Clean Air Act on nonmembers' lands within a reservation. Finding no such express delegation in

§ 301(d)(2)(B), I dissent from Part II.A of the opinion for the court.

I. Background

In *State of Montana v. United States*, 450 U.S. 544 (1981), the Crow tribe had sought to regulate nonmembers' hunting and fishing upon lands owned in fee by the State of Montana but lying within the boundaries of the Crow reservation. The Supreme Court, unanimous upon this point, held that a tribe generally lacks authority to regulate the conduct of nonmembers upon lands owned in fee by nonmembers ("fee lands"); of the two exceptions the Court noted, the only one arguably relevant here is that "[a] tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Absent such a threat or effect, tribal regulation of fee lands within a reservation requires an "express congressional delegation." *Id.* at 564.

The two provisions of the Clean Air Act relevant to the question of tribal authority to enforce the Act on fee lands were added by § 107 of the 1990 Amendments, Pub. L. No. 101-549, 104 Stat. 2399, 2464. Section 301(d) of the Act, 42 U.S.C. § 7601(d), provides in relevant part:

> (1) Subject to the provisions of paragraph (2), the Administrator . . . is authorized to treat Indian tribes as States under this chapter . . .
>
> (2) The Administrator shall promulgate regulations . . . specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States.

Such treatment shall be authorized only if—

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

Section 110(o) of the Act, 42 U.S.C. § 7410(o), provides in its entirety:

> If an Indian tribe submits an implementation plan to the Administrator pursuant to section [301(d), above], the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section [301(d)(2)]. When such plan becomes effective in accordance with the regulations promulgated under section [301(d)], the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

The EPA's Tribal Authority Rule (TAR) allows a tribe (subject to approval by the Administrator of the EPA) to

enforce the Clean Air Act on all land within the boundaries of a reservation without having to demonstrate its inherent authority over all such land. Under the clear rule of *Montana*, however, a tribe lacks inherent sovereign authority to regulate fee lands (and rights of way, *see Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997)) within a reservation except under the aforementioned exception announced in that case. Therefore, the TAR must be set aside as contrary to law unless the 1990 Amendments expressly delegate to tribes authority over fee lands and rights of way within a reservation. Upon that starting point for analysis the parties, the court, and I agree.

The EPA claims to find a delegation of authority in § 301(d)(2)(B) of the Clean Air Act. In evaluating this claim, the court is to accord no deference to the EPA's interpretation of that section because *Montana* requires an "express congressional delegation" in order to expand tribal authority. In other words, the EPA cannot prevail merely by demonstrating that its interpretation of § 301(d)(2)(B) is reasonable: the agency's interpretation must be correct if the TAR is to stand. Therefore, although we are reviewing an EPA rule-making, on this issue the focal point for our inquiry is not the EPA's interpretation but the statute itself. Upon this methodological point, too, all agree.

II. Analysis

With these agreed upon principles in mind, it seems to me clear that the 1990 Amendments do contain an express delegation of authority over fee lands and rights of way—but not in § 301(d), which governs tribal enforcement of all Clean Air Act programs specified by the Administrator. Rather, the delegation is in § 110(o), which governs only tribal implementation plans (TIPs). Because the specific

delegatory text in § 110(o) is significant to my conclusion that § 301(d) is not a delegation, I consider § 110(o) first.

A. Section 110(o) and the "Notwithstanding" Proviso

The petitioners' convoluted argument to the contrary notwithstanding, § 110(o) is self-evidently an express congressional delegation of authority to enforce TIPs on fee lands and rights of way within a reservation: "the [TIP] shall become applicable to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The same "notwithstanding" proviso has been a feature in the only two cases in which the Supreme Court has found an express delegation of authority to tribes. In *United States v. Mazurie*, 419 U.S. 544 (1975), and in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court found an express delegation of authority over fee lands within a reservation based upon two statutory provisions: 18 U.S.C. § 1161, which authorizes the tribes to enact ordinances regulating liquor in "Indian country"; and 18 U.S.C. § 1151, which defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *See Rice*, 463 U.S. at 715 & n.1 ("Congress has delegated authority . . . in Indian country [as defined in] 18 U.S.C. § 1151"); *see also Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (citing 18 U.S.C. §§ 1151 and 1161 together as an

express congressional delegation of authority over fee lands).*

B. Section 301(d)

The express congressional delegation just identified in § 110(o) cannot by itself support the TAR, however:. Because the TAR allows a tribe to enforce all applicable Clean Air Act programs—rather than just the TIP—on nonmember lands within its reservation, the EPA must demonstrate that § 301(d) likewise contains an express congressional delegation of authority.

The EPA argues the following text distilled from § 301(d) contains an express delegation to tribes of authority to regulate fee lands within a reservation:

> [T]he Administrator . . . is authorized to treat Indian tribes as States . . . . Such treatment shall be authorized only if . . . the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior

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* In a dictum, the *Brendale* Court noted as a second example of an express congressional delegation of authority §§ 518(e), (h)(1) of the Clean Water Act, 33 U.S.C. §§ 1377(e), (h)(1), the latter of which, significantly, contains the notwithstanding clause so glaringly absent from § 301(d). 492 U.S. at 428. In terms that otherwise track § 301(d) of the Clean Air Act, § 518(e) provides for conditionally treating a tribe as a state with regard to water resources "within the borders of an Indian reservation," defined in § 518(h)(1) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." In spite of the *Brendale* dictum, the EPA has concluded § 518 is not an express congressional delegation of authority, *see* 56 Fed. Reg. 64,876, 64,880 (1991), but no court has yet resolved the issue.

> boundaries of the reservation *or* other areas within the tribe's jurisdiction.

42 U.S.C. § 7601(d)(1)-(d)(2)(B) (emphasis added). The gist of the agency's argument, which the court accepts, is that the Congress expressly delegated authority over all lands within a reservation by linking "within the exterior boundaries of the reservation" disjunctively to "other areas within the tribe's jurisdiction." For the following reasons, I do not agree.

As the petitioners emphasize, when one reads the relevant sentence as a whole—rather than focusing solely upon the last phrase—one sees that, rather than expressing a delegation of authority over fee lands and rights-of-way within a reservation, the sentence by its terms merely lays down a precondition to the Administrator's treating a tribe as a state. Even more certainly, there is no way to read the phrase deemed crucial by the court ("within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction") as an express delegation of authority.

One important indication that the Congress did not intend this phrase as an express delegation is that it used the Court-tested "notwithstanding" proviso in § 110(o) but not in § 301(d)(2)(B). Sections 110(o) and 301(d)(2)(B) were enacted at the same time, in the same section of the same bill, so the different phrasing should not be thought just an artifact of legislative haphazardry. I do not believe that the Congress, obviously aware that it could enlarge tribal authority over nonmember lands only through an express delegation, would include the formulaic "notwithstanding" proviso—the gold standard for such delegations—in the narrower of the two sections, and then use an obscure and never-before-attempted formulation to accomplish the same result in the broader of the two sections. Further, the court's

interpretation of § 301(d)(2)(B) renders the "notwithstanding" proviso in § 110(o) surplusage—a point the court euphemistically acknowledges, Slip Op. at 23 ("a reinforcement of tribes' . . . [§ 301(d)(2)(B) authority] to implement TIPs in reservation land"). If § 301(d)(2)(B) is so clear as to constitute an express congressional delegation, it is difficult to believe that the Congress would "reinforce" this point in a narrower provision enacted at the same time as and expressly cross-referencing § 301(d).*

Finding an express congressional delegation in § 301(d) is made even more difficult, as the petitioners contend, by the Congress's having deleted a literal delegation to tribes that was included in the corresponding section of the bills by which the 1990 Amendments were first introduced in the House and the Senate: "the Administrator . . . may delegate to [ ] tribes primary responsibility for assuring air quality and enforcement of air pollution control." H.R. 2323, 101st Cong. § 604, *reprinted in* 2 Legislative History of the Clean Air Act

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* The court suggests the Congress may well have intentionally avoided using the "notwithstanding" proviso in § 301(d) in response to the EPA's having interpreted § 518 of the Clean Water Act as not being a delegation. Slip Op. at 13. The EPA's interpretation of the CWA was not adopted, however, until December 1991, more than a year after enactment of the 1990 Amendments. *See* 56 Fed. Reg. 64,876, 64,880. I am not willing blithely to "assume that Congress was aware of," much less responded to, the EPA's mere proposal to adopt that interpretation. When the 1990 Amendments were enacted, the EPA's unexplained proposal was still subject to change in the light of public comments, and even if finally adopted would not receive deference from a reviewing court charged with determining whether the Congress had made an express delegation to tribes. In contrast, we know for a certainty that the Congress was aware of *Brendale*, in which the Supreme Court instanced CWA § 518(h)(1) as an express congressional delegation: That case had been decided in June 1989, and is cited in the Senate Report on an earlier version of the 1990 Amendments, *see* S. Rep. No. 101-228, at 79.

Amendments of 1990, at 4053, 4101 (1993) *[hereinafter* 1990 Leg. Hist.]; S. 1630, 101st Cong. 111, *reprinted in* 5 1990 Leg. Hist. 9050, 9145. The Senate passed S. 1630 with this express delegation intact; the House, however, did not act upon H.R. 2323 but instead passed H.R. 3030, in which the delegation provision did not appear. *See* 2 1990 Leg. Hist. 1809, 1972-73 (House passage of S. 1630, amended in the nature of a substitution of H.R. 3030). The House version prevailed in conference, *see id.* at 478-79, so the 1990 Amendments as finally enacted into law do not contain this literal delegation provision. The court is of course correct that the Congress need not use the word "delegate" in order to effect an express delegation, Slip Op. at 15; § 110(o) illustrates the point. That the Congress "specifically rejected language favorable to [EPA's] position," Slip Op. at 12, however, is further evidence that the legislature did not mean to enact a delegation of authority. Indeed, to believe that the Congress meant § 301(d)(2)(B) to serve as a delegation, after it had included the "notwithstanding" proviso in the narrower § 110(o) and removed from § 301(d) a provision that expressly provided a delegation to tribes, would require one to believe the Congress was more interested in testing our interpretive acumen than in clearly expressing its will upon the important issue of tribal authority over nonmembers.

The court claims support for its contrary conclusion in the Congress having "moved from authorizing tribal regulation over the areas 'within the tribal government's jurisdiction' . . . to a bifurcated classification of all areas within 'the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction.'" Slip Op. at 12. Putting aside the question-begging interpolation of "all" into the quoted passage, I think the court misapprehends the significance of the phrase "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." As originally

introduced, H.R. 3030 referred only to air resources "within the exterior boundaries of the reservation." 2 1990 Leg. Hist. 3737, 3853. The House Committee on Energy and Commerce without comment added the phrase "or other areas within the tribe's jurisdiction," *id.* at 3021, 3069, and as mentioned, the House version later prevailed in conference. The legislative record is silent about why the Committee added that phrase. The most straightforward interpretation of the addition is that the Committee wanted to ensure that the treatment of tribes as states extended beyond the reservation to non-contiguous areas of tribal authority, such as dependent Indian communities. This seems far more likely than that a House committee, with no discussion, inserted the phrase "or other areas within the tribe's jurisdiction" in order to turn a simple reference to reservations into a delegation of authority over non-Indian lands within reservations.

Finally, I cannot agree with the court that we should find an express congressional delegation of authority in § 301(d)(2)(B) in any part because the contrary reading "would result in a 'checkerboard' pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the [Clean Air] Act." Slip Op. at 11-12. First, it is not at all clear that a "checkerboard" pattern—really a matter of certain fee lands remaining subject to State (or federal) rather than tribal authority, while surrounding areas go tribal—would result: a tribe remains free to demonstrate its inherent authority over any activity on fee lands that "threatens or has some direct effect on . . . the health or welfare of the tribe," *Montana*, 450 U.S. at 566. Therefore, if a tribe does find itself without authority over certain fee lands for want of an express delegation, that is only because no activities on those fee lands threaten or directly affect the health or welfare of the tribe.

Second, tribal authority over less than all lands within the boundaries of a reservation is the logical result of the tribes' "diminished status as sovereigns," *Montana*, 450 U.S. at 565. The *Montana* rule on its face contemplates less than uniform authority within a reservation; unless an exception applies, the tribe cannot regulate a parcel owned by a nonmember even though it retains authority over the surrounding lands owned by the tribe. *See, e.g., Brendale*, 492 U.S. at 428 (White, J., for the Court in part and dissenting in part), 443, 445 (Stevens, J., for the Court in part and concurring in the judgment in part) (each affirming non-uniform zoning authority). While the Congress could have chosen to sweep away such non-uniformity in § 301(d), as it did in § 110(o), the court's evident sense that the Congress should have done so is no basis for reading an express delegation into the statute where the Congress has not written one.*

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* *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), cited by the court today, certainly do not counsel reading an express delegation into a statute in order to avoid non-uniform tribal authority within a reservation. In *Seymour*, the Court held that "an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] § 1151," namely, the "notwithstanding" proviso. 368 U.S. at 358. And in *Moe*, the Court determined that because the Congress had "repudiated" but never formally repealed § 6 of the General Allotment Act, 25 U.S. § 349, the court would read § 6 narrowly in order to avoid creating an inconsistency with later-enacted statutes. 425 U.S. at 477-79. Thus, the Court was merely "follow[ing] Congress' lead in this area." *Id.* at 479. So, too, where the Congress has expressly delegated authority, as in § 110(o), we should certainly give its command full rein; but where it has not, we should not undertake to do so for it.

III. Conclusion

In my view, § 301(d)(2)(B) is not an express delegation of authority for Indian tribes to regulate the conduct of nonmembers on fee lands within the boundaries of a reservation. A tribe may be able, of course, to demonstrate its authority over such fee lands under the exception recognized in *Montana*. Without making such a showing, however, I do not believe the tribe may regulate the conduct of nonmembers on fee lands and rights-of-way except as provided by § 110(o). I therefore respectfully dissent from Part II.A. of the opinion for the court.

APPENDIX B

Tribal Authority Rule
63 Fed. Reg. 7254 (February 12, 1998)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 35, 49, 50, and 81

[OAR-FRL-5964-2]

RIN 2060-AF79

Indian Tribes: Air Quality Planning and Management

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (CAA) directs EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes in the same manner as states. For those provisions specified, a tribe may develop and implement one or more of its own air quality programs under the Act. This final rule sets forth the CAA provisions for which it is appropriate to treat Indian tribes in the same manner as states, establishes the requirements that Indian tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes to address air quality problems.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT: David R. LaRoche, Office of Air and Radiation (OAR 6102), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460 at (202) 260-7652.

SUPPLEMENTARY INFORMATION: Supporting information used in developing the final rule is contained in Docket No. A-93-3087. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

This preamble is organized according to the following outline:

I. Background of the Final Rule

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

B. Sovereign Immunity and Citizen Suit

C. Air Program Implementation in Indian Country

D. CAA Sections 110(c)(1) and 502(d)(3) Authority

III. Significant Changes from the Proposed Regulations

IV. Miscellaneous

A. Executive Order (EO) 12866

B. Regulatory Flexibility Act (RFA)

C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act (UMRA)

D. Paperwork Reduction Act

E. Submission to Congress and the General Accounting Office

I. Background of the Final Rule

Summary of Issues Raised by the Proposal

EPA proposed rules on August 25, 1994 (59 FR 43956) to implement section 301(d) of the Act. The proposal elicited many comments from state and tribal officials, private industry, and the general public. A total of 69 comments were received, of which 44 were from tribes or tribal representatives; 13 from state and local governments or associations; 10 from industry (primarily utilities and mining); and, 1 from Department of Energy (DOE) and 1 from an environmental interest group in Southern California. The tribes and several other commenters generally express support for the proposed rule and the delegation of CAA authority to eligible tribes to manage reservation air resources. Tribes especially urge EPA to expedite the finalization of this rule to enable tribes to begin to implement their air quality management programs and encourage EPA to recognize that the development of tribal air programs will be an evolving process requiring both time and significant assistance from EPA.

Most of the tribal commenters express concern with the inclusion of the citizen suit provisions which, they

believed, effected a waiver of their sovereign immunity; they recommend that this provision be deleted in the final rule. This is a major issue for tribes. State and local government and industry commenters are primarily concerned that the proposed rule would create an unworkable scheme for implementing tribal air quality programs, and many of these commenters question the scope of tribal regulatory jurisdiction.

Responses to many of the comments related to issues of jurisdiction and sovereign immunity are included in sections II.A and II.B in the analysis of comments below. Responses to comments on the issues raised concerning federal implementation in Indian country are addressed in sections II.C and II.D of this document. All other comments are addressed in a document entitled "response to comments" that can be found in the docket for this rule cited above.

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

1. Delegation of CAA Authority to Tribes

It is a settled point of law that Congress may, by statute, expressly delegate federal authority to a tribe. *United States v. Mazurie*, 419 U.S. 544, 554 (1975). *See also South Dakota v. Bourland*, 113 S. Ct. 2309, 2319-20 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-28 (1989) (White, J., for four Justice plurality). Such a delegation or grant of authority can provide a federal statutory source of tribal authority over designated areas, whether or not the tribe's inherent authority would extend to all such areas. In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that the CAA is a delegation of federal

authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs. Today, EPA is finalizing this approach. This grant of authority by Congress enables eligible tribes to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation.

EPA's position that the CAA constitutes a statutory grant of jurisdictional authority to tribes is consistent with the language of the Act, which authorizes EPA to treat a tribe in the same manner as a state for the regulation of "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA section 301(d)(2)(B). EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. *See also* CAA sections 110(o), 164(c).

In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation. *See generally Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). This interpretation of the CAA as generally delegating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) ("the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands" (citation to *Brendale* omitted)) (hereinafter referred to as "Senate

Report").[1] EPA also believes this territorial approach to air quality regulation best advances rational, sound, air quality management.

(a) Support for the delegation approach. Tribal commenters and several industry commenters support EPA's interpretation that the CAA constitutes a delegation of Congressional authority to eligible tribes to implement CAA programs over their entire reservations. Numerous tribal commenters assert that EPA's territorial delegation approach is consistent with federal Indian law and the intent of Congress as expressed in several provisions of the CAA. Several tribal commenters note that, while tribes have inherent sovereign authority over all air resources within the exterior boundaries of their reservations, EPA should finalize the delegation approach to avoid case-by-case litigation concerning inherent authority and to eliminate the disruptive potential of a "checkerboarded" pattern of tribal and state jurisdiction on reservations. Several tribal commenters assert that the delegation approach is compelled by the language of the CAA and federal Indian law principles. One tribal commenter states that the delegation approach is consistent with the federal government's trust responsibility to federally-recognized Indian tribes.

(b) Statutory Interpretation. Several state commenters assert that the CAA does not constitute an "express congressional delegation" of authority to tribes as

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[1] Further, it is a well-established principle of statutory construction that statutes should be construed liberally in favor of Indians, with ambiguous provisions interpreted in ways that benefit tribes. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992). In addition, statutes should be interpreted so as to comport with tribal sovereignty and the federal policy of encouraging tribal independence. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

required by the Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale*, 492 U.S. 408. Several state and industry commenters dispute EPA's interpretation of CAA section 301(d)(2)(B), which states that EPA may treat a tribe in the same manner as a state if, among other things, "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." One commenter asserts that the "or" in "or other areas within the tribe's jurisdiction" means that treatment of a state is authorized for a tribe as to air resources over which the tribe has jurisdiction, whether or not those areas fall within its reservation boundaries. In other words, tribes would not necessarily have jurisdiction over all sources within reservation boundaries. The commenter states that EPA has improperly read the "or" in section 301(d)(2)(B) as an "and."

EPA believes the plain meaning of section 301(d)(2)(B) is that a tribe can implement a CAA program for air resources if: (1) the air resources are within a reservation; or (2) the air resources are within a non-reservation area over which the tribe can demonstrate jurisdiction. The most plausible reading of the phrase "within * * * the reservation or other areas within the tribe's jurisdiction" is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without requiring the tribe to demonstrate its own jurisdiction, but to require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program. Under section 301(d)(2)(B), eligible tribes may be treated in the same manner as states for protecting "air resources" within "the reservation" or in "other areas within the tribe's jurisdiction." Both the term "reservation" and the phrase "other areas within the tribe's jurisdiction" modify the phrase "air resources." In addition, it is clear from the

structure of the provision and the CAA and legislative history taken as a whole that the phrase "within the tribe's jurisdiction" modifies the phrase "other areas" and not the term "reservation" or the phrase "air resources." If Congress intended to require tribes to demonstrate jurisdiction over reservations, Congress would have simply stated that EPA may approve a tribal program only for air resources over which the tribe can demonstrate jurisdiction.[2]

One commenter states that EPA's interpretation of CAA section 301(d)(2)(B) has made CAA section 301(d)(4), which allows EPA to administer provisions of the Act directly if treatment of a tribe as identical to a state is found to be "inappropriate or administratively infeasible," extraneous. The commenter asserts that if CAA section 301(d)(2)(B) is a delegation of authority to a tribe, EPA would never have cause to find treatment of a tribe as a state "inappropriate or administratively infeasible." EPA disagrees that its interpretation has made section 301(d)(2)(B) superfluous because, even with the delegation of federal authority to tribes for reservation areas, it is not appropriate or administratively feasible to treat tribes as states for all purposes. In such cases, section 301(d)(4) allows EPA, through rulemaking, to "directly administer such provisions [of the Act] so as to achieve the appropriate purpose" either by tailoring the provisions to tribes or conducting a federal program.

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[2] Contrary to the commenter's assertion, EPA does not interpret the "or" in this section as an "and". If the "or" were an "and", under section 301(d)(2) EPA would be authorized to approve a tribal program "only if" the functions to be exercised by the tribe pertain to air resources that are both within a reservation and within non-reservation areas over which the tribe can demonstrate jurisdiction. This interpretation is nonsensical. Moreover, nothing in the Act or legislative history suggests that Congress intended to limit so severely the universe of tribes eligible for CAA programs.

An industry commenter states that CAA section 110(o), which provides that when a tribal implementation plan (TIP) becomes effective under CAA section 301(d) "the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation * * *," does not support EPA's interpretation of the CAA as a delegation because section 110(o) is only applicable to plans EPA approved pursuant to regulations under section 301(d).

EPA believes that section 110(o) recognizes that approved tribes are authorized to exercise authority over all areas within the exterior boundaries of a reservation for the purposes of TIPs. EPA notes that the commenter omitted the following remaining language in the quoted sentence from CAA section 110(o): "located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." EPA believes that this additional language makes clear that TIPs may apply to all areas within the exterior boundaries of reservations. EPA believes that the phrase "except as expressly provided otherwise in the plan" refers to a situation where a tribe seeks to have its TIP apply only to specific areas within a reservation.

An industry commenter states that the CAA does not depart from other Congressional provisions regarding "treatment as a state" in the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) and EPA has already determined that these other statutes do not constitute a delegation of authority to tribes. EPA notes that the CAA "treatment as a state" provision is notably different from the SDWA "treatment as a state" provision. *Compare* CAA § 301(d)(2) ("the functions to be exercised by the Indian tribe [must] pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction") *with* SDWA §

1451(b)(1)(B) ("the functions to be exercised by the Indian tribes [must be] within the area of the Tribal Government's jurisdiction"). In addition, although CWA section 518(e) and CAA section 301(d) both contain language regarding tribal programs over "Indian reservations," EPA believes that the overall statutory scheme and legislative history of the CAA represent a clearer expression than that of the CWA that Congress intended to effectuate a delegation to tribes over reservations.[3] EPA notes that, except for the provisions in CWA section 518(e) and SDWA section 1451(b)(1)(B), the Water Acts do not otherwise indicate what areas are subject to tribal regulatory authority. By contrast, several provisions of the CAA expressly recognize that tribes may exercise CAA authority over all areas within the exterior boundaries of the reservation. See CAA sections 110(o) and 164(c).

One industry commenter states that EPA should make clear that the CAA does not supersede other laws that may define or limit the extent of tribal regulatory jurisdiction.[4]

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[3] EPA also notes that a federal district court has stated that CWA section 518(e) may be read as an express delegation of authority to tribes over all reservation water resources. *Montana v. U.S. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (D. Mont. 1996) citing *Brendale*, 492 U.S. at 428 (White, J.). In the preamble to its 1991 CWA regulation, EPA found the statutory language and legislative history of the CWA too inconclusive for the Agency to rely on the delegation theory, but noted that "the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved." 56 FR 64876, 64880-881 (December 12, 1991).

[4] This commenter also asserts that the *Chevron* doctrine does not support EPA's interpretation that the CAA settles all jurisdictional issues on lands within reservations. While EPA believes that the CAA represents a clear delegation of authority to eligible tribes over reservation resources, EPA notes that, to the extent the statute is ambiguous, EPA's interpretation would be entitled to deference. In addition, the Agency has broad expertise in reconciling federal

The commenter states that, given that the CAA does not supersede all other laws regarding tribal jurisdiction, EPA should follow a case-by-case approach for addressing jurisdiction within reservation boundaries. One state association notes that some states have statutory jurisdiction over non-Indian fee lands located on reservations and EPA does not address how conflicts between the CAA and these statutes will be addressed.

EPA believes that the CAA delegation of authority to eligible tribes over reservations represents a more recent expression of Congressional intent and will generally supersede other federal statutes. See *Adkins v. Arnold*, 235 U.S. 417, 420 (1914) (noting that "later in time" statutes should take precedence). There may be, however, rare instances where special circumstances may preclude EPA from approving a tribal program over a reservation area. For example, in rare cases, there may be another federal statute granting a state exclusive jurisdiction over a reservation area that may not be overridden by the CAA. There may also be cases where a current tribal constitution may limit tribal exercise of authority.[5]

EPA will consider on a case-by-case basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation. Appropriate governmental entities will have an opportunity to raise these unique issues on a case-by-case basis during EPA's review of a tribal application. Where tribes are aware

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environmental and Indian policies. *Washington Department of Ecology*, 752 F.2d 1465, 1469 (9th Cir. 1985).

[5] Among other things, the commenter questions whether pre-existing treaties or binding agreements may limit the extent of regulatory jurisdiction. EPA believes that the CAA generally would supersede pre-existing treaties or binding agreements that may limit the scope of tribal authority over reservations.

of such issues, they should bring the issues to EPA's attention by including them in the tribe's "descriptive statement of the Indian tribe's authority to regulate air quality" under 40 CFR 49.7(a)(3). If EPA determines that there are special circumstances that would preclude the Agency from approving a tribal program over a reservation area, the Regional Administrator would limit the tribal approval accordingly under 40 CFR 49.9(e) and (g).

(c) Legislative History. Several industry and local government commenters assert that the legislative history does not support EPA's interpretation of the CAA as a delegation. They state that Senate Report No. 101-228, pp. 78-79, 1990 U.S. Code Cong. Admin. News at 3464-65 (Senate Report) evidences Congress' intent that the CAA authorizes tribal programs in the same manner as had been authorized under the CWA and SDWA, both of which EPA has interpreted to authorize tribal programs only in areas over which a tribe can demonstrate inherent jurisdiction. The commenter also states that the Senate Report made clear that treatment as a state is only authorized for areas within a tribe's jurisdiction. In addition, one commenter states that Congress in 1990 knew how similar provisions of the CWA and SDWA had been interpreted and "Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law. * * *" citing *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 50 (2nd Cir. 1985). One commenter further argues that the Senate Report refers to *Brendale*, which requires a case-by-case approach to tribal inherent jurisdiction.

EPA acknowledges that the summary of the treatment as a state provisions in the Senate Report contains a general statement suggesting that tribes are to demonstrate jurisdiction for all areas for which they seek a program, including reservation areas. However, the summary is followed by a detailed discussion that makes clear that

Congress intended to provide an express delegation of power to Indian tribes for all reservation areas and to require a jurisdictional showing only for non-reservation areas. Senate Report at 79.

In addition, the Senate Report cited *Brendale* for the proposition that Congress may delegate federal authority to tribes. Moreover, although *Brendale* does support a case-by-case approach to evaluating tribal inherent authority over non-members of the tribe, EPA notes that the Senate Report cites the section of the *Brendale* opinion (pages 3006-07) in which Justice White recognizes that Congress may expressly delegate to a tribe authority over non-members. See *Brendale*, 109 S.Ct. 2994, 3006-07 (1989). EPA believes that this statement in the Senate Report further supports EPA's view that the CAA was intended to be a delegation. EPA also notes that in 1989, when the Senate Report was written, EPA had not yet finalized its interpretation that Congress, in the CWA, did not clearly intend a delegation to tribes. See 56 FR 64876, 64880-881 (December 12, 1991); *see also Montana v. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (noting that the CWA may be read as a delegation of CWA authority to tribes over reservations). Thus, read as a whole, the Senate Report supports EPA's interpretation that the CAA is a delegation.

(d) Limitations on Congressional delegations of authority. Several state and municipal commenters state that *Montana*, *Brendale*, and *Bourland* establish that tribes generally do not have authority to regulate the activities of nonmembers on nonmember-owned fee lands. Several commenters also assert that tribes generally will not have inherent authority over sources of air pollution on non-Indian owned fee lands within a reservation. As discussed in detail in the preamble to the proposed rule (59 FR 43958 *et seq.*), EPA believes that tribes generally will have inherent authority over air pollution sources on fee lands. 59 FR at

43958 n.5; *see also Montana v. EPA*, 941 F.Supp. 945 (D. Mont. 1996)(upholding EPA's determination that the Confederated Salish and Kootenai Tribes possess inherent authority over nonmember activities on fee lands for purposes of establishing water quality standards under the CWA). Nonetheless, because the Agency is interpreting the CAA as an explicit delegation of federal authority to eligible tribes, it is not necessary for EPA to determine whether tribes have inherent authority over all sources of air pollution on their reservations.

Several commenters state that only delegations over lands and activities subject to inherent tribal power are permissible. One commenter states that the proposed rule should be modified to require tribes to establish preexisting authority for on-reservation CAA programs, at least with regard to fee lands held by nonmembers within reservations. Two commenters, one citing the United States Constitution and the other citing *U.S. v. Morgan*, 614 F.2d 166 (8th Cir. 1980), also assert that a tribe cannot have delegated authority over nonmembers on fee lands living in a non-Indian community within a reservation. A state commenter asserts that these two factors, i.e., whether a tribe possesses inherent authority and whether the delegation is over nonmembers living on fee lands within a non-Indian community, were factors considered by the Supreme Court in *Mazurie* in evaluating whether Congress had validly delegated federal authority to tribes to regulate the introduction of alcoholic beverages into Indian country.

EPA believes that Indian tribes have sufficient independent authority to assume a Congressional delegation of authority to implement CAA programs. The Supreme Court in *Mazurie* acknowledged that Indian tribes have sovereignty over "both their members and their territory." 419 U.S. at 557. As discussed above, EPA believes that tribes generally will have inherent authority to regulate

sources of air pollution on nonmember-owned fee lands within reservations as well. However, EPA notes that the Court in *Mazurie* held that it is not necessary for a tribe to have independent authority over all matters that would be subject to the delegated authority; rather "[i]t is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce * * * with the Indian tribes.'" 419 U.S. at 557 (citation omitted).

In addition, while the Court in *Mazurie* noted that Constitutional limits on the authority of Congress to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," the Court did not say that some independent source of authority was an absolute prerequisite for a Congressional delegation. 419 U.S. at 556-57.[6] Even in a case where a particular tribe's inherent authority is markedly limited, the detailed parameters outlined in the CAA and EPA's oversight role over tribal exercise of authority delegated by the CAA are sufficient to ensure that Constitutional limitations on the delegated authority have not been exceeded.

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[6] One industry commenter asserts that delegations of federal authority from Congress must "clearly delineate" policy and standards to be effective or valid, citing *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105 (1946). According to this commenter, EPA's proposed interpretation does not meet this standard. EPA agrees that the non-delegation doctrine does include a limitation on the devolution of legislative power under terms so vague as to be standardless, but that limitation has become a very low threshold, *see Mistretta v. United States*, 488 U.S. 361 (1989)(Scalia, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Rehnquist, J., concurring in the judgment), and is easily met by the CAA. The CAA provides detailed direction to tribes on the parameters under which CAA programs are to be implemented.

Furthermore, EPA disagrees with the commenter's assertion that the United States Constitution and federal court precedent prohibit Congress from delegating authority to a tribe over nonmembers on fee land living in a non-Indian community within a reservation. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), *reh'g en banc denied*, 1994 U.S. App. Lexis 501 (1994), *cert denied*, 512 U.S. 1236 (1994); *see also Rice v. Rehner*, 463 U.S. 713, 715 (1983) (noting that Congress, in 18 U.S.C. 1161, delegated to tribes authority to regulate liquor throughout Indian country, including in non-Indian communities). The discussion in *Morgan and Mazurie* about "non-Indian communities" was centered around the specific language of 18 U.S.C. sections 1154 and 1156 regarding introduction of alcoholic beverages into Indian country, and is not relevant to an interpretation of the CAA. In addition, EPA notes that the Eighth Circuit Court of Appeals, in *City of Timber Lake*, 10 F.3d 554, declined to follow its prior decision in *Morgan*, and concluded that 18 U.S.C. section 1161 delegated authority to tribes to regulate liquor in all of Indian country, including non-Indian communities.

One industry commenter asserts that, if EPA finalizes its position that Congress has delegated federal authority to tribes, EPA should state explicitly in its rule that the Bill of Rights and other federal protections for regulated entities apply to tribal air programs. EPA notes that the Indian Civil Rights Act imposes tribal on governments restrictions similar to those contained in the Bill of Rights and the Fourteenth Amendment, including the prohibitions against the denial of due process and equal protection, and the taking of private property without just compensation. 25 U.S.C. 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987). EPA believes that

whether or not the Bill of Rights applies to tribes implementing the CAA on reservations is an issue for the courts to decide when and if the issue arises in a particular case. *See Mazurie*, 419 U.S. at 558 n. 12.

(e) Use of the word "reservation." Several tribal commenters supported EPA's proposal to construe the term "reservation" to include trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a "reservation." *See* 59 FR at 43960; 56 FR at 64881; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991). Some tribal commenters suggested that the definition of "reservation" in proposed § 49.2 be broadened specifically to include "trust land that has been validly set apart for use by a Tribe, even though the land has not been formally designated as a reservation."

A state commenter states that EPA has not provided an analysis of relevant provisions in the CAA to support its proposition that the term "reservation" includes "trust land that has been validly set apart for the use of a Tribe." In addition, this commenter questions EPA's reliance on *Oklahoma Tax Comm'n* because that case deals with trust lands in Oklahoma and may not be universally applicable. Several commenters express concern that the phrase "exterior boundaries of the reservation" could encompass lands held in fee by nonmembers outside of areas formally designated as "reservations." A state commenter suggests that EPA should require a case-by-case demonstration in cases where non-Indian-owned lands exist which may be surrounded by the exterior boundaries of a Pueblo. The commenter asserts that in these circumstances there is no evidence that the non-Indian lands were "validly set apart for the use of the Indians as such, under the superintendence of the Government." The State of Oklahoma objects to EPA's use of the word "reservation" because, by federal law, the term "reservation"

can include former reservations in Oklahoma, which include approximately the entire State. *See* 25 U.S.C. 1425. The State suggests that EPA should limit the term reservation to include only tribal trust land in Oklahoma; lands held in trust for individual Indians, Oklahoma asserts, should not be considered "reservations."

It is the Agency's position that the term "reservation" in CAA section 301(d)(2)(B) should be interpreted in light of Supreme Court case law, including *Oklahoma Tax Comm'n*, in which the Supreme Court held that a "reservation," in addition to the common understanding of the term, also includes trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation. In applying this precedent to construe the term "reservation" in the context of the CWA, the Agency has only recognized two categories of lands that, even though they are not formally designated as "reservations," nonetheless qualify as "reservations": Pueblos and tribal trust lands. EPA will consider lands held in fee by nonmembers within a Pueblo to be part of a "reservation" under 40 CFR 49.6(c) and 49.7(a)(3). EPA will consider on a case-by-case basis whether other types of lands other than Pueblos and tribal trust lands may be considered "reservations" under federal Indian law even though they are not formally designated as such. Appropriate governmental entities will have an opportunity to comment on whether a particular area is a "reservation" during EPA's review of a tribal application. The Agency does not believe that additional, more specific language should be added to the regulatory definition of "reservation," because the Agency's interpretation of the term "reservation" will depend on the particular status of the land in question and on the interpretation of relevant Supreme Court precedent.

A tribal consortium states that the proposed requirement in § 49.7(a)(3) that tribes "must identify with

clarity and precision the exterior boundaries of the reservation * * *" precludes Alaska Native villages from applying for EPA-approved CAA programs. The full language of the proposed requirement in § 49.7(a)(3) is "[f]or applications covering areas within the exterior boundaries of the applicant's Reservation the statement must identify with clarity and precision the exterior boundaries of the reservation * * *." If a tribe is seeking program approval for non-reservation areas, the tribe need not provide a reservation description. As noted below, EPA is finalizing its proposed position, under section 301(d)(2)(B), that an eligible tribe may implement its air quality programs in non-reservation areas provided the tribe can adequately demonstrate authority to regulate air quality in the non-reservation areas in question under general principles of Indian law. Thus, if an Alaska Native village can demonstrate authority to regulate air resources in non-reservation areas, the areas will be considered "other areas within the tribe's jurisdiction" under section 301(d)(2)(B) of the Act.

(f) Policy Rationales. Industry and municipal commenters state that it is improper for EPA to base its interpretation of the CAA regarding tribal jurisdiction on policy arguments seeking to avoid "jurisdictional entanglements" and checkerboarding. A state comments that given the intense controversy surrounding the issue of authority over the activities of nonmembers on fee lands, litigation is likely. The commenter states that litigation would cause long-term jurisdictional uncertainties, which will erode effective implementation of the Act, and that EPA should address and resolve jurisdictional issues in the reservation program planning stage. One industry commenter asserts that EPA's proposal to interpret the CAA as a delegation is inconsistent with EPA policy statements that EPA will authorize tribal programs only where tribes "can demonstrate adequate jurisdiction over pollution sources

throughout the jurisdiction." July 10, 1991 EPA/State/Tribal relations memorandum, signed by Administrator Reilly.

EPA's interpretation of the CAA is based on the language, structure, and intent of the statute. The Agency believes that Congress, in the CAA, chose to adopt a territorial approach to the protection of air resources within reservations—an approach that will have the effect of minimizing jurisdictional entanglements and checkerboarding within reservations. EPA expects that the delegation approach will minimize the number of case-specific jurisdictional disputes that will arise and enhance the effectiveness of CAA implementation. EPA notes that its interpretation of the CAA does not conflict with the Agency's general Indian policy statements regarding tribal jurisdiction. Under the CAA, EPA will not approve a tribe unless it has the authority to implement the program either by virtue of delegated federal authority over reservation areas, or a demonstration of authority under principles of federal Indian law over other areas on a case-by-case basis.

(g) Current and historical application of state laws on parts of reservations. State and industry commenters assert that states have historically regulated non-member CAA-related activities on fee lands within reservation boundaries and the proposal ignores this historical treatment and the transition issues it raises. The commenters suggest that EPA consider changing the proposed regulations to "grandfather" existing facilities subject to state authority, so that states continue to regulate those facilities until the affected parties all agree cooperatively to a transition from state to tribal jurisdiction. One commenter states that both the affected state and EPA would need to approve any necessary state implementation plan (SIP) revisions.

It is EPA's position that, unless a state has explicitly demonstrated its authority and been expressly approved by EPA to implement CAA programs in Indian country, EPA is

the appropriate entity to be implementing CAA programs prior to tribal primacy. See preamble section II.C. and II.D. for a discussion of federal implementation of CAA programs in Indian country. EPA will not and cannot "grandfather" any state authority over Indian country where no explicit demonstration and approval of such authority has been made. EPA, as appropriate, will address any need for SIP revisions on a case-by-case basis.

2. Authority in Non-Reservation Areas Within a Tribe's Jurisdiction

CAA section 301(d)(2)(B) provides that a tribe may be treated in the same manner as a state for functions regarding air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction" (emphasis added). In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that this provision authorizes an eligible tribe to develop and implement tribal air quality programs in non-reservation areas that are determined to be within the tribe's jurisdiction. Today, EPA is finalizing this approach.

(a) Support for EPA's approach. Several tribal commenters support EPA's interpretation that "other areas within the Tribe's jurisdiction" in CAA section 301(d)(2)(B) means that a tribe may implement its air quality programs in non-reservation areas under its jurisdiction, generally including all non-reservation areas of Indian country. One tribal commenter asserts that the "Indian country" standard is the standard consistently used by courts in determining a tribe's jurisdiction.

(b) Request for Clarification. Several commenters request that EPA clarify what is meant by the phrase "other areas within a Tribe's jurisdiction." Some commenters state that this phrase must be clarified to avoid conflicts between

states and tribes in interpreting their own jurisdiction and uncertainty for regulated sources. One commenter urges EPA to develop published criteria by which the Agency will decide whether a tribe may develop and implement a CAA program in areas outside the exterior boundaries of a reservation. Some commenters also request that EPA clarify what is meant by "Indian country."

EPA notes that the phrase "other areas within the tribe's jurisdiction" contained in CAA section 301(d)(2)(B) and 40 CFR 49.6 is meant to include all non-reservation areas over which a tribe can demonstrate authority, generally including all non-reservation areas of Indian country. As noted above, it is EPA's interpretation that Congress has not delegated authority to otherwise eligible tribes to implement CAA programs over non-reservation areas as it has done for reservation areas. Rather, a tribe seeking to implement a CAA program over non-reservation areas may do so only if it has authority over such areas under general principles of federal Indian law.

EPA notes that the definition of "Indian country" contained in 18 U.S.C. section 1151, while it appears in a criminal code, provides the general parameters under federal Indian law of the areas over which a tribe may have jurisdiction, including civil judicial and regulatory jurisdiction. *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2 (1975). EPA acknowledges that there may be controversy over whether a particular non-reservation area is within a tribe's jurisdiction. However, EPA believes that these questions should be addressed on a case-by-case basis in the context of particular tribal applications. EPA has established a process under section 49.9 for appropriate governmental entities to comment on assertions of authority in individual tribal applications. More discussion of the parameters of "Indian country" is provided in the detailed response to comment document.

Some tribal commenters object to EPA's description of the proposed requirement in § 49.7(a)(3)(ii) that, where a tribe seeks to have its program cover areas outside the boundaries of a reservation, the tribe must demonstrate its "inherent authority" over those areas. These commenters assert that the term "inherent authority" must be clarified because it may inappropriately limit the potential sources of tribal authority to regulate non-reservation air resources. EPA agrees that there may be cases where a tribe has authority to regulate a non-reservation area that derives from a federal statute or some other source of federal Indian law that is not based on "inherent authority." Section 49.7(a)(3)(ii) only asks a tribe seeking to implement a CAA program in a non-reservation area to "describe the basis for the tribe's assertion of authority * * *." Under this provision, a tribe may include any basis for its assertion of authority.

Some tribal commenters ask EPA to take the position that the phrase "other areas within the tribe's jurisdiction" means that tribes will have control over sources in close proximity to a reservation. One tribe comments that EPA has a trust responsibility to ensure that tribes have authority to control sources of air pollution outside of reservation boundaries that affect the health and welfare of tribal members living within reservation boundaries. One tribe asks whether non-reservation jurisdictional areas include ceded lands where tribes retain the right to hunt and fish.

As noted above, it is EPA's position that, while Congress delegated CAA authority to eligible tribes for reservation areas, the CAA authorizes a tribe to implement a program in non-reservation areas only if it can demonstrate authority over such areas under federal Indian law. Thus, a tribe may implement a CAA program over sources in non-reservation areas, including ceded territories, if the tribe can demonstrate its authority over such sources under federal Indian law. CAA provisions regarding cross-boundary

impacts are the appropriate mechanisms for addressing cases where sources outside of tribal authority affect tribal health and environments. See, e.g., CAA sections 110(a)(2)(D), 126, and 164(e). The issue of cross-boundary impacts is discussed further in the response to comments document.

(c) Comments challenging EPA's interpretation of the CAA. Some commenters state that CAA section 110(o) limits the jurisdictional reach of a TIP to areas located within the boundaries of a reservation. One commenter asserts that since a tribe can only implement its TIP within a reservation, to allow a tribe to implement other parts of the CAA in non-reservation areas would be unmanageable and unreasonable.

EPA believes that the reference in CAA section 110(o) to "reservation" is simply a description of the type of area over which a TIP may apply. EPA does not believe the provision was intended to limit the scope of TIPs to reservations. CAA section 301(d)(1) authorizes EPA to treat a tribe in the same manner as a state for any provision of the Act (except with regard to appropriations under section 105) as long as the requirements in section 301(d)(2) are met. EPA has decided to include most of the provisions of section 110 in the group of provisions for which treatment of tribes in the same manner as a state is appropriate. Section 301(d)(2) permits EPA to approve eligible tribes to implement CAA programs, including TIPs, over non-reservation areas that are within a tribe's jurisdiction.

An industry commenter asserts that the Senate Report evidences that Congress intended to provide tribes the same opportunity to adopt programs as provided under the CWA and SDWA. This commenter asserts that tribal jurisdiction under those statutes is limited to reservations. EPA notes that the SDWA does not limit tribal programs to reservations. See 42 U.S.C. 300j-11(b)(1)(B) (authorizing a tribal role "within the area of the Tribal Government's jurisdiction."). EPA also notes that there is evidence in the Senate Report

that Congress intended to authorize EPA to approve eligible tribes for CAA programs in non-reservation areas of Indian country that are within a tribe's jurisdiction. The report states that section 301(d) is designed "to improve the environmental quality of the air wit[h]in Indian country in a manner consistent with EPA Indian Policy and 'the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments' * * *." Senate Report at 79 (emphasis added) (citing EPA's 1984 Indian Policy); *see also, id.* at 80.

3. Other Jurisdictional Issues

Several local governments comment that the final rule should ensure that tribes with very small reservations do not have authority under an air program to adversely affect economic development in adjacent areas, intrude upon the jurisdiction of local governments, or create checkerboarded regulation. One commenter asserts that the proposal would allow for EPA approval of "islands" of Indian programs and "will create the same problems for states and local governments which EPA believes will be eliminated by granting tribes full regulatory power over all land within reservation borders." In addition, a state commenter states that extending tribal programs to non-reservation areas within the parameters of 18 U.S.C. section 1151 conflicts with EPA's goal under the CAA of increasing cohesive air quality management. Several commenters state that regulation by tribes with very small reservations or other very small areas of Indian country would be administratively impractical.

Several local governments state that a minimum size should be placed on areas to be considered for tribal jurisdiction. An industry commenter suggests that the final rule limit non-reservation tribal programs to those areas under tribal jurisdiction that are contiguous with reservations.

Some local government commenters also state that EPA, instead of a tribe, should consider enforcing programs on small areas of Indian country.

EPA acknowledges that there may be cases where the Agency may approve a tribe's application to implement a CAA program over a relatively small land area. EPA also recognizes that approval of a tribal program over a small area that is surrounded by land covered by a state CAA program could lead to less uniform regulation. However, EPA believes it would be inappropriate to place a blanket limitation on the geographic size of an approvable tribal program. EPA notes that Congress, in the CAA, authorized the Agency to approve tribal CAA programs when a tribe meets the criteria contained in CAA section 301(d)(2)(B) without regard to size of area. In addition, it is long-standing federal Indian policy to support tribal self-government and a government-to-government relationship with federally recognized Indian tribes. See Senate Report at 79; April 29, 1994 Presidential Memorandum, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22,951 (May 4, 1994). Furthermore, EPA policy favors tribal over federal implementation of environmental programs in areas under tribal jurisdiction. *See* 59 FR at 43962; November 8, 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations." EPA also recognizes that under the realities of federal Indian law, there are some small pockets of Indian country under tribal and federal jurisdiction that lie among lands under state jurisdiction. While EPA recognizes that its approval of tribal programs over small areas may result in less uniform regulation in some cases, the Agency believes that the approach to tribal jurisdiction outlined in this Tribal Authority Rule best reconciles federal Indian and environmental policies. See *Washington Department of Ecology*, 752 F.2d at 1469. The Agency's overall approach

minimizes the potential for checkerboarded regulation within Indian reservations (see preamble at II.A.1.(a)), while promoting tribal sovereignty and self-determination.

One tribal commenter states that pollution from air sources outside a tribe's jurisdiction must be addressed. This commenter states that section 126 of the CAA, while designed to address this issue, is awkward and probably difficult to administer. In addition, local government commenters state that the off-site effect of approving tribal programs for Indian lands should be considered. One local commenter states that "mutual protection for air quality goals, health values and customs should be assured for all within any physical air basin to the extent workable."

EPA notes that several provisions of the CAA are designed to address cross-boundary air impacts. EPA is finalizing its proposed approach that the CAA protections against interstate pollutant transport apply with equal force to states and tribes. Thus, EPA is taking the position that the prohibitions and authority contained in sections 110(a)(2)(D) and 126 of the CAA apply to tribes in the same manner as states. As EPA noted in the preamble to its proposed rule, section 110(a)(2)(D), among other things, requires states to include provisions in their SIPs that prohibit any emissions activity within the state from significantly contributing to nonattainment, interfering with maintenance of the national ambient air quality standards (NAAQS), or interfering with measures under the Prevention of Significant Deterioration (PSD) or visibility protection programs in another state or area. In addition, section 126 authorizes any state or tribe to petition EPA to enforce these prohibitions against a state containing an allegedly offending source or group of sources. The issue of cross-boundary impacts is discussed further in the response to comment document.

Several tribal commenters note that, in the preamble to the proposed rule, EPA misstated the dollar limitation

contained in the Indian Civil Rights Act on criminal fines that may be imposed by tribes. EPA agrees that the dollar limitation in the Indian Civil Rights Act on criminal fines is $5,000 as opposed to $500.

B. Sovereign Immunity and Citizen Suit

1. Section 304

In its August 25, 1994 Notice of Proposed Rulemaking (NPR) EPA proposed, under the CAA's section 301(d) rulemaking authority, that the citizen suit provisions contained in section 304 of the Act should apply to tribes in the same manner in which they apply to states. See 59 FR at 43978. In today's final action, EPA is declining to announce a position, in the context of the rulemaking required under section 301(d) of the Act, regarding whether tribes are subject to the citizen suit provisions contained in section 304, and therefore is not finalizing the position stated in the NPR. In order to facilitate tribal adoption and implementation of air quality programs in a manner similar to state-implemented programs, section 301(d) requires EPA to specify through rulemaking those provisions of the Act which the Agency believes are appropriate to apply to tribes. EPA's rulemaking approach has been to deem all CAA provisions appropriate for tribes, except for those provisions specifically listed in the rule regarding which EPA, for various reasons, believes it may be inappropriate for the Agency, solely in the context of its 301(d) authority, to make such a determination. Thus, the direct consequence for today's final action of EPA's decision not to adopt the position presented in the NPR regarding the provisions of section 304 is that section 304 has been added to the list of those CAA provisions which, for section 301(d) purposes, EPA has concluded it is not appropriate to determine that tribes should be treated as states. That list is

contained in section 49.4 of today's rule. EPA is also clarifying the relationship of this final action regarding section 304 to the right that tribes enjoy, as sovereign powers, to be immune from suit. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

The Agency received a number of comments on the section 304 citizen suit issue. One group of industry commenters appears to be in favor of tribes being subject to citizen suits, and is particularly concerned that non-tribal members be provided with similar enforcement opportunities for TIPs as are required for SIPs. The majority of comments received on this issue came from tribal governments, mainly disputing EPA's claim that section 301(d), as a legal matter, provided EPA with the authority to apply the section 304 citizen suit provisions to tribes since doing so would appear to have the effect of administratively waiving tribal sovereign immunity. These commenters argue that only the tribes themselves or Congress may waive tribal sovereign immunity and, further, that Congressional intent to waive tribal sovereign immunity may not be implied but must be express and unequivocal. They do not believe that the CAA, including section 301(d), contains such an express waiver. Several of the commenters also state that because states are subject to section 304 only "to the extent permitted by the Eleventh Amendment to the Constitution," applying it to tribes would likely make the requirement more burdensome than it would be for states. Several tribal commenters also express the view that citizen suit recourse is unnecessary since EPA retains enforcement authority under various other CAA provisions, for example, sections 110(m), 179(a)(4), and 502(i). Finally, concern is expressed that adopting a policy of subjecting tribes to citizen suits could hinder development of tribal air programs because it could add significant resource constraints, financial and otherwise, particularly with respect to potential litigation.

Section 304 of the CAA reflects the general principle underlying all environmental citizen suit provisions, namely that actors who accept responsibility for regulating health-based standards and who voluntarily commit themselves to undertake control programs in furtherance of such goals, ought to be accountable to the citizens those programs are designed to benefit. However, EPA agrees, as several commenters pointed out, that section 304 only applies to states to the extent permitted by the Eleventh Amendment to the Constitution. The Supreme Court has interpreted the provisions of the Eleventh Amendment as generally serving to protect a state from liability to suit where the state does not consent to be sued. EPA believes that, just as states implementing air quality programs are not subject to citizen suits except to the extent permitted by the Eleventh Amendment of the Constitution and the provisions of the Clean Air Act, by analogy, in the context of air program implementation in Indian country, the issue of citizen suit liability would be determined based on established principles of tribal sovereign immunity and the provisions of the Clean Air Act. This is meant to emphasize that no EPA action in this final rule either enhances or limits the immunity from suit traditionally enjoyed by Indian tribes as sovereign powers.

Because the Eleventh Amendment does not apply to tribes (by its terms, the Eleventh Amendment only addresses suits brought "against one of the United States"), and because the provisions of section 304 (and the applicable definitions in section 302) do not expressly refer to tribes, EPA has been concerned that the action it proposed to take may have subjected tribes to citizen suit liability in situations in which citizens could not sue states. Because of this uncertainty, EPA believes it is not appropriate to attempt to resolve this significant issue in the context of the limited scope of the rulemaking required under section 301(d).

EPA also notes that courts have long recognized that citizen plaintiffs may bring actions for prospective injunctive relief against state *officials* under the CAA section 304 citizen suit provisions, as well as under other environmental statutes with similar citizen suit provisions. *See Council of Commuter Organizations v. Metro. Transp.*, 683 F.2d 663, 672 (2nd Cir. 1982). *See also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 n.17 (1996) (acknowledging that lower courts have entertained suits against state officials pursuant to citizen suit provisions in environmental statutes substantially identical to CAA section 304(a)(1)). While this raises the question of whether such actions could be brought against "tribal officials," EPA believes this issue is also outside the scope of this rulemaking.

2. Judicial Review Provisions of Title V

In its proposed rulemaking, EPA proposed to treat tribes in the exact same manner as states for purposes of the provisions of CAA sections 502(b)(6) and 502(b)(7) addressing judicial review under the Title V Operating Permits Program. 59 FR at 43972. For the reasons discussed below, in today's final action EPA is withdrawing its proposal to treat tribes in the exact same manner as states for purposes of these judicial review provisions. As described below, however, tribes that opt to establish a Title V program will still need to meet all requirements of sections 502(b)(6) and 502(b)(7) except those provisions that specify that review of final action under the Title V permitting program be "judicial" and "in State court."

As noted above in the discussion regarding the applicability of CAA section 304 to tribes, commenters express concern over waivers of tribal sovereign immunity to judicial review. Several tribal commenters also note that requiring tribes to waive sovereign immunity in order to run

a Title V program will be a strong disincentive for tribes to assume these programs. Two industry commenters state that nonmembers that are regulated by tribes must have access to courts for judicial review. Several commenters express concern that some tribal governments may lack a distinct judicial system.[7]

EPA recognizes the importance of providing citizens the ability to hold accountable those responsible for regulating air resources. Nonetheless, EPA also acknowledges that applying the judicial review provisions of Title V to tribes through this rule would raise unique issues regarding federal Indian policy and law. EPA is mindful of the vital importance of sovereign immunity to tribes. In addition, EPA is aware that in some instances tribes do not have distinct judicial systems. Finally, EPA has long recognized the importance of encouraging tribal implementation of environmental programs and avoiding the establishment of unnecessary barriers to the development of such programs. *E.g.*, EPA's 1984 Indian Policy; *see also* Senate Report at 8419 (noting that section 301(d) is generally intended to be consistent with EPA's 1984 Indian Policy).

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[7] Two industry commenters stated that tribal courts "lack many procedural, substantive law and constitutional protection[s] for non-members." EPA is aware that tribal governments are not subject to the requirements of the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution, and that review of tribal court decisions in federal court may be limited. However, EPA notes that the Indian Civil Rights Act requires tribes to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment, including due process of law, equal protection of the laws, and the right not to have property taken without just compensation. 25 U.S.C. § 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. *See Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

EPA seeks to strike a balance among these various considerations. See *Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

In order to ensure a meaningful opportunity for public participation in the permitting process, it is EPA's position that some form of citizen recourse be available for applicants and other persons affected by permits issued under tribal Title V programs. One option for review of final actions taken under a tribal Title V program is for tribes to consent to suit through voluntary waiver of their sovereign immunity in tribal court. EPA supports the continued development and strengthening of tribal courts and encourages those tribes that will implement Title V permitting programs to consent to challenges by permit applicants and other affected persons in tribal court. For the reasons discussed above, however, requiring tribes to provide for review in the exact same manner as states pursuant to section 502(b)(6) is not appropriate.

In some cases, well-qualified tribes seeking approval of Title V programs may not have a distinct judiciary, but rather may use non-judicial mechanisms for citizen recourse. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) ("Non-judicial tribal institutions have * * * been recognized as competent law-applying bodies."). In addition, a requirement that tribes waive their sovereign immunity to judicial review, in some cases, may discourage tribal assumption of Title V programs. Thus, EPA is willing to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be bound.

EPA has consistently stressed the importance of judicial review under state Title V programs. *E.g., Virginia v. Browner*, 80 F.3d 869, 875 (4th Cir. 1996) ("EPA interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. Notice of Proposed Disapproval, 59 Fed. Reg. 31183, 31184 (June 17, 1994)"), *cert denied* 117 S.Ct. 764 (1997). However, the statutory scheme regarding tribal clean air programs is quite different from that of states. Section 301(d)(2) of the Act explicitly provides EPA with the discretion to "specify * * * those provisions for which it is appropriate to treat Indian tribes as States." 42 U.S.C. 7601(d)(1). In addition, section 301(d)(4) of the Act states that where EPA "determines that treatment of tribes as identical to states is inappropriate or administratively infeasible, [EPA] may provide, by regulation, other means by which [EPA] will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. 7610(d)(4). As EPA noted in the preamble to the proposed rule, tribes have a "unique legal status and relationship to the Federal government that is significantly different from that of States. [C]ongress did not intend to alter this when it authorized treatment of Tribes 'as States' under the CAA." 59 FR at 43962, n.11.

In addition, there is ample precedent for treating tribes and states differently under federal Indian law. *E.g.*, U.S. Const. amend. XIV; Indian Civil Rights Act, 25 U.S.C. 1301 *et. seq.*; and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara*, the Supreme Court addressed the availability of federal court review of tribal action under the Indian Civil Rights Act (ICRA), which requires tribal governments to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment. In finding that no additional federal court

remedies beyond habeas corpus were provided by Congress for review of tribal compliance with the ICRA, the Court noted that Congress had struck a balance between the dual statutory objectives of enhancing individual rights without undue interference with tribal sovereignty. *Santa Clara*, 436 U.S. at 65-66. EPA has concluded that in enacting section 301(d) of the Act, Congress provided EPA with the discretion to balance the goals of ensuring meaningful opportunities for public participation under the CAA and avoiding undue interference with tribal sovereignty when determining those provisions for which it is appropriate to treat tribes in the same manner as states. *See Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) ("it is appropriate for us to defer to EPA's expertise and experience in reconciling [Indian policy and environmental policy], gained through administration of similar environmental statutes on Indian lands.").

In addition to the requirement that tribal Title V programs provide some avenue for appeal of tribal government action or inaction and for injunctive-type relief, EPA may use several oversight mechanisms to ensure that tribal Title V programs provide adequate opportunities for citizen recourse. *E.g.*, CAA sections 502(i)(requiring EPA assumption of state or tribal Title V programs that EPA finds are not being adequately implemented or enforced), 505(b) (requiring EPA objection to state or tribal Title V permits that EPA finds do not meet applicable requirements).

Thus, under today's final rulemaking, EPA is not requiring tribes to provide for judicial review in the same manner as states under CAA section 502(b)(6). EPA will develop guidance in the future on acceptable alternatives to judicial review. In reviewing the Title V program submission of any tribe proposing an alternative to judicial review, EPA will apply such guidance to determine, pursuant to its section 301(d) authority, whether the tribe has provided

for adequate citizen recourse consistent with the requirement in CAA section 502(b)(6) that there be review of final permit actions and the guidance and principles discussed above.

EPA emphasizes that tribes seeking to implement the Title V program will still need to meet all the requirements of CAA section 502(b)(6), except the requirements that review of final permit actions be "judicial" and "in state court." Specifically, tribes seeking to implement the Title V program, will need to provide:

[a]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for * * * review * * * of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

CAA section 502(b)(6). In addition, all provisions of CAA section 502(b)(7) will apply to tribal programs except the requirements that the review be "judicial" and in "State court."

C. Air Program Implementation in Indian Country

The August 25, 1994, proposed tribal authority rule set forth EPA's view that, based on the general purpose and scope of the CAA, the requirements of which apply nationally, and on the specific language of sections 301(a) and 301(d)(4), Congress intended to give to the Agency broad authority to protect tribal air resources. The proposal went on to state that EPA intended to use its authority under

the CAA "to protect air quality throughout Indian country" by directly implementing the Act's requirements in instances where tribes choose not to develop a program, fail to adopt an adequate program or fail to adequately implement an air program." *Id.* at 43960. Comments on this issue were received from tribes, state and local government representatives, and industry.

The comments generally support the discussion of EPA's authority under the CAA to protect air quality throughout Indian country, but, overall, seek specific clarification with respect to the time frame and scope of federal implementation. In addition, several commenters, although focusing on different aspects of the issue, express a general concern that there be no diminution or interruption in tribal air resource protection while tribal programs are being developed. EPA acknowledges the seriousness of the concerns identified by the commenters and agrees that a clearer presentation of the Agency's intentions is appropriate.

Most tribal commenters support establishing federal air programs under the circumstances outlined in the proposal, but many are concerned with the past lack of enforcement of environmental programs on tribal lands. Almost all commenters express concern with the lack of a definite timetable for federal initiation of air programs to protect tribal air resources and prevent gaps in protection. Tribal Commenters generally support the provision in the proposal to develop an implementation strategy and a plan for reservation air program implementation; however, they request that EPA develop time frames and establish dates for developing the implementation strategy. A state commenter argues that the proposal did not sufficiently allow for state comment or input in the development of the implementation strategy, asserting that both state and tribal involvement will be necessary to avoid regulatory conflicts. A number of government and industry commenters suggest that EPA

elaborate on the process for developing tribal air programs in light of the interrelationship between existing air programs and new tribal programs. Another commenter requests that EPA resolve the process for transition from existing tribal programs to programs as part of this rulemaking. One state comments that the transfer must be accomplished without leaving sources of air pollution and the states in air quality "limbo" pending development of either tribal or EPA programs to regulate sources under the jurisdiction of a tribe. Another state argues that if a tribe has no approved program and EPA has no reason for enforcement, section 116 preserves the state's inherent authority to regulate non-member sources on a reservation. One tribe asks that the process for transferring administration of an EPA-issued permit for a source on tribal lands to the tribe be made more explicit. Many tribal commenters request technical and administrative support in the form of guidance documents, training, sufficient financial resources, and EPA staff assigned to work with tribes on tribal CAA programs who are knowledgeable about tribal law and concerns. These commenters also express concern that limited resources might prevent EPA from providing this critical support.

As indicated above, EPA recognizes the seriousness of the concerns expressed in these comments and has undertaken an initiative to develop a comprehensive strategy for implementing the Clean Air Act in Indian country. The strategy will articulate specific steps the Agency will take to ensure that air quality problems in Indian country are addressed, either by EPA or by the tribes themselves. This strategy [a draft of which is available in the docket referenced above] addresses two major concerns: (1) Gaps in Federal regulatory programs that need to be filled in order for EPA to implement the CAA effectively in Indian country where tribes opt not to implement their own CAA programs; (2) identifying and providing resources, tools, and technical

support that tribes will need to develop their own CAA programs.

EPA believes that the strategy being developed addresses many of the concerns expressed by the commenters. Once tribal programs are approved by EPA, tribes will have authority to regulate all sources within the exterior boundaries of the reservation under such programs. One of the most prevalent concerns is the status of sources (current and future) in Indian country not yet subject to the limits of an implementation plan. Commenters want assurance that EPA would step in to fill this gap and ensure adequate control. The Agency has consistently recognized the primary role for tribes in protecting air resources in Indian country and has expressed its continued commitment to work with tribes to protect these resources in the absence of approved tribal programs. The Agency has issued permits and undertaken the development of Federal Implementation Plans (FIP) to control sources locating in Indian country. For example, the Agency is working with both the Shoshone-Bannock and the Navajo Tribes to address pollution control of major sources on their Reservations. The Agency has also issued PSD preconstruction permits to new sources proposing to locate in Indian country. The Agency has started to explore options for promulgating new measures to ensure that EPA has a full range of programs and Federal regulatory mechanisms to implement the CAA in Indian country.

Since the 1994 proposal, EPA has tried specifically to identify the primary sources of air pollution emissions in Indian country, and evaluate the CAA statutory authorities for EPA to regulate those sources pending submission and approval of a TIP. EPA has determined that the CAA provides the Agency with very broad statutory authority to regulate sources of pollution in Indian country, but there are

instances in which EPA has not yet promulgated regulations to implement its statutory authority.

One example is the absence of complete air permitting programs in Indian country. EPA has promulgated regulations establishing permit requirements for major sources in attainment areas, and issued Prevention of Significant Deterioration permits to new or modifying major sources. See 40 CFR 52.21. However, EPA has not promulgated regulations for a permitting program in Indian country for either minor or major sources of air pollution emissions in nonattainment areas. Therefore, EPA is currently drafting nationally applicable regulations for such minor and major source permitting programs. The permitting programs are expected to apply to construction or modification of all minor sources and to major sources in nonattainment areas. In addition, the planned permitting program would allow existing sources to voluntarily participate in the permitting program and accept enforceable permit limits. EPA regional offices would be the permitting authority for this program. With respect to Title V operating permits, EPA has proposed to include Indian country within the scope of 40 CFR Part 71. Therefore, the Part 71 regulations would apply to all major stationary sources of air pollution located in Indian country.

Many CAA requirements apply in Indian country without any further action by the EPA. For example, the standards and requirements of the Standards of Performance for New Sources, 42 U.S.C. 7411 and 40 CFR Part 60, apply to all sources in Indian country. Similarly, the National Emissions Standards for Hazardous Air Pollutants, 42 U.S.C. 7412 and 40 CFR Part 63 apply in Indian country.

EPA has, however, identified categories of sources of air pollution, such as open burning and fugitive dust, that are not covered by those regulations. For these categorical sources, EPA believes that it has the authority to promulgate

regulations on a national basis that would apply until a TIP has been submitted and approved. EPA has also identified a number of general air quality rules, such as the prohibition against emitting greater than 20 percent opacity, which could be promulgated nationally for application in Indian country pending TIP approval.

EPA is optimistic that any additional regulations can be promulgated and implemented relatively quickly, since, along with the protections they would provide, such regulations can also serve as models which tribes can use in drafting TIPs.

EPA wishes to emphasize that the national rules it intends to promulgate will be analogous to, but not the same in all respects, as the types of rules generally approved into State Implementation Plans. For example, EPA's federal rules are likely to represent an average program, potentially more stringent than some SIP rules and less stringent than others. However, by promulgating such rules, EPA would not be establishing, and should not be interpreted by States as setting, new minimal criteria or standards that would govern its approval of SIP rules. EPA encourages and will work closely with all tribes wishing to replace the future federal regulations with TIPS. EPA intends that its federal regulations will apply only in those situations in which a tribe does not have an approved TIP.

EPA will actively encourage tribes to provide assistance in the development of the proposed regulations referenced above to ensure that tribal considerations are addressed and development of the regulations will be subject to notice and comment rulemaking procedures.

The case-by-case nature of program implementation in Indian country makes it difficult to address concerns about plans and time lines. The Agency's strategy for implementing the CAA in Indian country proposes a multi-pronged approach, one prong of which is federal

implementation described above. The other prongs derive from a "grass-roots" approach in which staff in the EPA regional offices work with individual tribes to assess the air quality problems and develop, in consultation with the tribes, either tribal or federal strategies for addressing the problems.

1. Building Tribal Capacity. An essential component of the Agency's CAA implementation strategy is to assess the extent to which tribes have developed an environmental protection infrastructure and determine how best to build tribal capacity to implement their own CAA programs. The assessment will be done in cooperation with the tribes and may include any or all of the following:

a. Needs Assessment. An initial step for effectively implementing the CAA in Indian country is to identify the air quality concerns and determine how well the tribes are able to address them. EPA will work with the tribes to develop emission inventories and air monitoring studies (where appropriate) to determine the nature of the problem and identify a range of potential control strategies. From this information, EPA and the tribes will jointly develop, as needed, tribal or federal implementation plans (TIPs/FIPs) to address the problem. These TIPs/FIPs may include, for example, controls on minor sources, categorical prohibitory rules, area source controls (e.g., vapor recovery, open burning ordinances).

b. Communication. A critical part of the Agency's strategy to build tribal capacity is outreach and communication. Outreach has already begun as EPA regional staff worked with tribes in their service area to draft the Strategy for Implementing the CAA in Indian Country. Outreach will continue with the promulgation of this rule; staff will meet with Tribes in regional meetings held throughout the country to talk about implementing the rule and answer questions. In follow-up to these initial meetings, EPA will adopt a multi-media approach to communicating

with the Tribes and other stakeholders (conferences, conference calls, newsletters, Internet, etc.) to ensure timely access to information and guidance developed in support of this rule.

c. Training. The third component for building tribal capacity is training, providing in various forms and through various media the skills and knowledge needed to implement an air quality protection program in Indian country. EPA already supports a training program at Northern Arizona University (NAU) that offers basic introductory workshops on air quality program management and administration and a more in-depth course in air pollution control technology. This program, offered at no cost to tribes, helps tribal environmental professionals develop competence in air quality management. The program also prepares these professionals for enrollment in more advanced courses in EPA's Air Pollution Training Institute (APTI). In addition to these formal training opportunities, EPA offers internships to college students interested in pursuing an environmental career and supports an outreach program in high schools in Indian country to encourage these students' interest in environmental protection careers. EPA plans to encourage other options for promoting tribal professional development, including peer-to-peer support, temporary assignments with other government (state, tribal, or federal) environmental programs, and cooperative agreements to provide technical assistance.

As these individual tribal assessments are completed, the information will be compiled in order to determine to what extent commonalities exist among the air quality problems that might be amenable to common solutions (e.g., Title V, minor sources, etc.). The Agency will work in concert to develop other common solutions, as needed. At the same time, EPA is developing guidance documents,

templates, and model analyses to assist tribes in developing Tribal Air Programs.

Finally, EPA recognizes that air quality problems in Indian country do not exist in isolation and that often they are part of a broader spectrum of environmental problems, the solutions for which may be best developed through an integrated approach to environmental protection. EPA's Office of Air & Radiation will continue to work with other media offices to develop overall environmental assessments (through the Tribal/EPA Environmental Agreement process) for Indian country and develop integrated approaches where appropriate. One approach, for example, might be to focus on ways to simultaneously protect air quality, water quality, and other public health and environmental values through control strategies that reduce atmospheric deposition of air pollutants in Indian country.

D. CAA Sections 110(c)(1) and 502(d)(3) Authority

In the proposed tribal rule, EPA stated that it was not proposing to treat tribes in the same manner as states under its section 301(d) authority with respect to the specific provision in section 110(c)(1) that directs EPA to promulgate, "within 2 years," a Federal Implementation Plan (FIP) after EPA finds that a state has failed to submit a required plan, or has submitted an incomplete plan, or within 2 years after EPA has disapproved all or a portion of a plan. 59 FR at 43965. The proposed exception applied only for that provision of section 110(c)(1) that sets a specified date by which EPA must issue a FIP. The proposal went on to state that "EPA would continue to be subject to the basic requirement to issue a FIP for affected [tribal] areas within some reasonable time." In today's action, EPA is finalizing the general approach discussed in the proposal, but has altered the method for implementing that approach.

Therefore, although the result that was intended by the proposal remains unchanged, after further review, EPA is modifying the regulatory procedure by which it achieves that result, and is also clarifying the statutory basis it is relying upon for doing so.

The proposed rule set forth EPA's view that one of the principal goals of the rulemaking required under section 301(d) is to allow tribes the flexibility to develop and administer their own CAA programs to as full an extent as possible, while at the same time ensuring that the health and safety of the public is protected. However, since, among other things, tribal authority for establishing CAA programs was expressly addressed for the first time in the 1990 CAA Amendments, in comparison to states, tribes in general are in the early stages of developing air planning and implementation expertise. Accordingly, EPA determined that it would be infeasible and inappropriate to subject tribes to the mandatory submittal deadlines imposed by the Act on states, and to the related federal oversight mechanisms in the Act which are triggered when EPA makes a finding that states have failed to meet required deadlines or acts to disapprove a plan submittal. As the proposal noted, section 301(d)(2) provides for EPA to promulgate regulations specifying those provisions for which it is appropriate to treat tribes as states, but does not compel tribes to develop and seek approval of air programs. In other words, there is no date certain submittal requirement imposed by the Act for tribes as there is for states. Thus, since the FIP obligation under section 110(c)(1) is keyed to plan submission failures by states that are contemplated with respect to "a required submission," and to plan disapprovals that have not been cured within a specified time frame, the discussion in the proposal regarding section 110(c)(1) was consistent with the approach summarized above. However, given that the statutory basis underlying section 110(c)(1) is either

expressly inapplicable to tribal plans or is linked to submittal deadlines that the Agency is today determining are inappropriate or infeasible to apply to tribal plan submissions, that section as a whole—not merely the provision setting a specific date by which EPA must issue a FIP—should have been included on the list of proposed CAA provisions for which EPA would not treat tribes in the same manner as states.

Consequently, in this final action, EPA has added section 110(c)(1) in its entirety to the list of CAA provisions in the rule portion of this action (§ 49.4) for which EPA is not treating tribes in the same manner as states. However, by including the specific FIP obligation under section 110(c)(1) on the list in section 49.4 of this final rule, EPA is not relieved of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian country. In the absence of an express statutory requirement, EPA may act to protect air quality pursuant to its "gap-filling" authority under the Act as a whole. See, *e.g.*, CAA section 301(a). Moreover, section 301(d)(4) provides EPA with discretionary authority, in cases where it has determined that treatment of tribes as identical to states is "inappropriate or administratively infeasible," to provide for direct administration through other regulatory means. EPA is exercising this discretionary authority and has created a new section (§ 49.11) to this final rule which provides that the Agency will promulgate a FIP to protect tribal air quality within a reasonable time if tribal efforts do not result in adoption and approval of tribal plans or programs. Thus, EPA will continue to be subject to the basic requirement to issue a FIP for affected tribal areas within some reasonable time.

The proposal notice made clear that even while the Agency was proposing not to treat tribes as states for purposes of the specified date in section 110(c)(1), it was

always EPA's intention to retain the requirement to issue a FIP, as necessary and appropriate, for affected tribal areas. The bases and rationale for that determination are thoroughly set forth in 59 FR 43956 (especially at pages 43964 through 43966) and remain the same. The only change between the proposal and this final notice regards the methodology used to achieve the intended result, i.e., using the Agency's section 301(d)(4) discretionary authority in conjunction with its general "gap-filling" CAA authority.

Similarly, EPA is taking final action on its proposal not to treat tribes in a manner similar to states for the provision of section 502(d)(3) which requires issuance by EPA, within two years of the statutory submittal deadline, of a federal operating permit program if EPA has not approved a state program. The Agency has proposed, pursuant to its section 301(d)(4) authority, to include in its final rule addressing federal implementation of operating permit programs in Indian country a commitment to implement such programs by a date certain in instances where a tribe chooses not to implement a program or does not receive EPA approval of a submitted program. 62 FR 13748. In light of this commitment, EPA does not believe it is necessary to retain the text in § 49.4(j) acknowledging its federal authority.

III. Significant Changes to the Proposed Regulations

A. Part 35—State and Local Assistance

Section 35.205 Maximum Federal Share and Section 35.220 Eligible Indian Tribe. In its proposed rule, EPA sought comment on the appropriate level of tribal cost share for a section 105 grant, from a minimum of five percent to a maximum of 40 percent. The proposal also asked for comments on the establishment of a phase-in period for tribes

to meet whatever match is ultimately required for section 105 grants. Tribes universally comment that the level of matching funds should be kept to a minimum, i.e., five percent, if not waived altogether, especially during the early stages of developing an air quality program. One tribe asserts that Title V cannot be viewed as the solution to funding tribal air programs; other financial resources must also be made available. In addition, EPA notes that only a small number of tribes have applied for section 105 grants despite being eligible to receive such grants as air pollution control agencies under section 302(b)(5) and section 301(d)(5). EPA attributes much of the tribes' reluctance to apply for these grants to the match requirement of forty percent that has been applicable to all section 105 grants.

EPA agrees with the commenters that tribal resources generally are not adequate to warrant the level of match required of states and that equivalent resources are unlikely to become available in the foreseeable future. A high match requirement would likely discourage interested tribes from developing and implementing air programs. It is not appropriate to compare the resources available for the development of state programs to that of tribes because tribes often lack the resources or tax infrastructure available to states for meeting cost share requirements. Furthermore, a low match requirement, with a hardship waiver, is consistent with federal Indian policy which encourages the removal of obstacles to self-government and impediments to tribes implementing their own programs.

Accordingly, EPA has determined that it is inappropriate to treat tribes identically to states for the purpose of the match requirement of section 105 grants. Therefore, pursuant to its authority under section 301(d)(4), EPA will provide a maximum federal contribution of 95 percent for financial assistance under section 105 to those tribes eligible for treatment in the same manner as states for

two years from the initial grant award. After the initial two-year period of 5 percent match, EPA will increase each tribe's minimum cost share to 10 percent, as long as EPA determines that the tribe meets certain objective and readily-available economic indicators that would provide an objective assessment of the tribe's ability to increase its share. Within eighteen months of the promulgation of this rule, the Agency will, with public input, develop guidance setting forth the precise procedures for evaluating tribal economic circumstances and will identify those economic indicators (for example, tribal per capita income, tribal unemployment rates, etc.) that will be used to support its determinations.

The tribal match will not be waived unless the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used. The Agency does not foresee any circumstances that would justify eliminating this waiver provision for those eligible tribes that are able to demonstrate that meeting the match requirement would result in undue financial hardship. This waiver provision is not available to tribes that establish eligibility for a section 105 grant pursuant to § 35.220(b).

The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of the date of publication of this rule.

Finally, the definition of Indian Tribe in § 35.105 has been changed to make it consistent with the definition found in the CAA at section 302(r) and the definition in § 49.2.

B. Title V Operating Permits Program: Operational Flexibility

The Agency received comments that objected to the proposed rule's position that tribal part 70 programs would not be required to include the same operational flexibility provisions required of state part 70 programs. The proposal preamble suggested that the three operational flexibility provisions at 40 CFR 70.4(b)(12) would be optional for tribes as would 40 CFR 70.6(a)(8), 40 CFR 70.6(a)(10), and 40 CFR 70.6(a)(9). A brief description of each of these provisions follows.

The three operational flexibility provisions in § 70.4(b)(12) require permitting authorities to: (1) allow certain changes within a facility without requiring a permit revision; (2) allow for trading increases and decreases in emissions in the facility where the applicable implementation plan provides for such trading; and (3) allow trading of emissions increases and decreases in the facility for the purposes of complying with a federally-enforceable emissions cap that is established in the permit. These provisions implement section 502(b)(10) of the Act. EPA has proposed to modify these provisions, by deleting the first provision and making some technical clarifications to the third provision. See 60 FR 45529 (August 31, 1995).

Section 70.6(a)(8) requires as a standard condition that permits contain a provision stating that no permit revision shall be required under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

Section 70.6(a)(10) requires a standard condition (upon request of the applicant) that allows for emissions trading at a source if the applicable requirement provides for trading without a case-by-case approval of each emission trade.

Section 70.6(a)(9) requires as a standard condition (upon request of the applicant and approval by the permitting authority) terms that describe reasonably anticipated operating scenarios.

Initially, EPA believed that the technical expertise required to implement operational flexibility provisions would make it too difficult for tribal programs to obtain EPA approval. Accordingly, the Agency proposed that, for purposes of these provisions, tribes would not be treated in the same manner as states. However, EPA now believes that a better approach would be to treat tribes in the same manner as states for purposes of these provisions, while providing sufficient technical assistance, if needed, to enable tribes to issue permits that meet these operational flexibility requirements. Such an approach will assure that sources will be provided maximum flexibility regardless of whether the permitting agency is a tribal or state agency. In addition, it will afford sources that are subject to tribal part 70 programs the benefit of streamlined provisions that have been proposed for part 70.

C. Section 49.4 Clean Air Act Provisions for Which Tribes Will Not Be Treated in the Same Manner as States

Based on the comments received regarding tribal sovereign immunity and citizen suits (see discussion at II.B), EPA is withdrawing its proposal to treat tribes as states for purposes of section 304 and the judicial review provisions of sections 502(b)(6) and 502(b)(7) of the Act and has revised § 49.4 accordingly.

D. Section 49.8 Provisions for Tribal Criminal Enforcement Authority

EPA is modifying the language under this provision to clarify the federal role in criminal enforcement of tribal programs. Where tribes are precluded by law from asserting criminal enforcement authority, the federal government will exercise criminal enforcement responsibility. To facilitate this process, the Criminal Investigation Division office located at the appropriate EPA regional office and the tribe will establish a procedure by which any duly authorized agency of the tribe (tribal environmental program, tribal police force, tribal rangers, tribal fish and wildlife agents, tribal natural resources office, etc.) shall provide timely and appropriate investigative leads to any agency of the federal government (EPA, U.S. Attorney, BIA, FBI, etc.) which has authority to enforce the criminal provisions of federal environmental statutes. This procedure will be incorporated into the Memorandum of Agreement between the tribe and EPA. Nothing in the agreement shall be construed to limit the exercise of criminal enforcement authority by the tribe under any circumstances where the tribe may possess such authority.

E. Section 49.9 EPA Review of Tribal Clean Air Act Applications

New Process for Determining Eligibility of Tribes for CAA Programs

Many state, local government and industry commenters suggest that the proposed 15-day review period provided by EPA to identify potential disputes regarding a tribal applicant's assertion of reservation boundaries and jurisdiction over non-reservation areas should be extended. Suggested changes to the proposed 15-day review period range from 30 to 120 days. Commenters cite the potential complexity of jurisdictional issues and the amount of time

required to respond adequately, especially for non-reservation areas. These commenters also express concern that notice and an opportunity for comment regarding reservation boundaries and tribal jurisdiction over non-reservation areas is being limited to "appropriate governmental entities." Industry commenters suggest that notice and opportunity for comment also be provided to the regulated community, as well as other interested parties (e.g., landowners whose property could potentially fall under tribal jurisdiction). In addition, one industry commenter states that such determinations should be viewed as rulemakings under the Administrative Procedures Act (APA) and, thus, subject to public notice and comment.

Consistent with the TAS process which EPA has historically implemented under the Clean Water and Safe Drinking Water Acts, the preamble to EPA's proposed rule on tribal CAA programs stated that the CAA TAS process "will provide States with an opportunity to notify EPA of boundary disputes and enable EPA to obtain relevant information as needed[.]" 59 FR at 43963. The proposal also indicated that a principal concern in developing the eligibility process was to streamline the process to eliminate needless delay. *Id.* In proposing to limit the notice and comment provision to "appropriate governmental entities" and the period within which to respond to 15 days with the possibility of a one-time extension of another 15 days, EPA was generally affirming prior "treatment as state" (TAS) practice. EPA notes that neither the Water statutes nor the CAA mandates a specific process regarding TAS determinations, including jurisdiction. Under CAA section 301(d)(2)(B), EPA must evaluate whether a tribe has demonstrated that the air resource activities it seeks to regulate are either within a reservation area, or within a non-reservation area over which the tribe has jurisdiction. In doing so, the Agency has provided for notice and a limited

opportunity for input respecting the existence of competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas to "appropriate governmental entities," which the Agency has defined as states, tribes and other federal entities located contiguous to the tribe applying for eligibility. See generally, 56 FR 64876, 64884 (Dec. 12, 1991). This practice recognizes, in part, that to the extent genuine reservation boundary or non-reservation jurisdictional disputes exist, the assertion of such are an inherently government-to-government process. Nonetheless, EPA seeks to make its notification sufficiently prominent to inform local governmental entities, industry and the general public, and will consider relevant factual information from these sources as well, provided (for the reason given above) they are submitted through the identified "appropriate governmental entities." In making determinations regarding eligibility in the context of the Water Acts, EPA has explained that the part of the process that involves notifying "appropriate governmental entities" and inviting them to review the tribal applicant's jurisdictional assertion is designed to be a fact-finding procedure to assist EPA in making these statutorily-prescribed determinations regarding the tribes' jurisdiction; it is not in any way to be understood as creating or approving a state or non-tribal oversight role for a statutory decision entrusted to EPA. For these reasons, EPA also disagrees with the industry commenter about the status of these decisions under the APA. Given that there is no particular process specified under EPA governing statutes for TAS eligibility determinations, they are in the nature of informal adjudications for APA purposes. As such, EPA does not believe there is a legal requirement for any additional process than what the Agency already provides. By contrast, EPA decisions regarding tribal authority to implement CAA programs generally are rulemaking actions involving public

notice and comment in the **Federal Register**. The approach in the proposed CAA rule was intended to follow the above process, including its imposed limitations (such as a 15-day review period), to ensure that overall eligibility decisions should not be delayed unduly.

In today's rulemaking, EPA recognizes that the potential complexities of reservation boundary and non-reservation jurisdictional issues may require additional review time and is finalizing an initial notice and comment period of 30 days with the option for a one-time extension of 30 days for disputes over non-reservation areas, should the issues identified by the commenters warrant such extension. EPA agrees that in some cases issues regarding tribal jurisdiction over non-reservation areas may be complex and may require more extensive analysis. However, EPA believes that many jurisdictional claims will be non-controversial and will not elicit adverse comments. In these instances, a comment period in excess of 30 days is not warranted. If, however, the tribal claims involve non-reservation areas and require more extensive analysis, an extension to the comment period may be warranted. In all cases, comments from appropriate governmental entities must be offered in a timely manner, and must be limited to the tribe's jurisdictional assertion.

State and industry commenters question the appropriateness of the language in § 49.9 of the regulatory portion of the proposal which states that eligibility decisions regarding a tribe's jurisdiction will be made by EPA Regional Administrators, as it appears to imply that jurisdictional disputes will always be resolvable at the Agency level. EPA continues to believe that the Regional Administrators are the appropriate decision makers for tribal eligibility purposes, including jurisdictional assertions. However, the Agency does agree that the language, as written, may have been confusing. Consequently, EPA has

modified the first sentence of § 49.9(e). As explained previously, EPA has been making eligibility decisions pursuant to the TAS process under other environmental statutes for some time now. The TAS process set forth in this rule, including the process for making tribal jurisdictional determinations, is consistent with the approach followed by EPA in related regulatory contexts. EPA notes again that it believes that many submissions regarding jurisdiction by tribes requesting eligibility determinations will be non-controversial.

This final rule allows tribes to submit simultaneously to EPA a request for an eligibility determination and a request for approval of a CAA program. In such circumstances, EPA will likely announce its decision with respect to eligibility and program approval in the same **Federal Register** notice, for purposes of administrative convenience. However, EPA does not intend this simultaneous decision process of itself to be interpreted as altering the Agency's view (described above) regarding APA applicability with respect to notice and review opportunities provided to appropriate governmental entities with respect to tribal reservation boundary and non-reservation jurisdictional assertions.

F. Section 49.11 Actions Under Section 301(d)(4) Authority

This section addresses the regulatory provisions being added to this rule pursuant to CAA section 301(d)(4). See discussion at Part II.D above.

IV. Miscellaneous

A. Executive Order (EO) 12866

Section 3(f) of EO 12866 defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

This rule was determined to be a significant regulatory action. A draft of this rule was reviewed by the Office of Management and Budget (OMB) prior to publication because of anticipated public interest in this action including potential interest by Indian tribes and state/local governments.

EPA has placed the following information related to OMB's review of this proposed rule in the public docket referenced at the beginning of this notice:

(1) Materials provided to OMB in conjunction with OMB's review of this rule; and

(2) Materials that identify substantive changes made between the submittal of a draft rule to OMB and this notice, and that identify those changes that were made at the suggestion or recommendation of OMB.

B. Regulatory Flexibility Act (RFA)

Under the RFA, 5 U.S.C. 601-612, EPA must prepare, for rules subject to notice-and-comment rulemaking, initial and final Regulatory Flexibility Analyses describing the impact on small entities. The RFA defines small entities as follows:

—Small businesses. Any business which is independently owned and operated and is not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.

—Small governmental jurisdictions. Governments of cities, counties, towns, townships, villages, school districts or special districts, with a population of less than fifty thousand.

—Small organizations. Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

However, the requirement of preparing such analyses is inapplicable if the Administrator certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

The rule will not have a significant economic impact on a substantial number of small entities. Many Indian tribes may meet the definition of small governmental jurisdiction provided above. However, the rule does not place any mandates on Indian tribes. Rather, it authorizes Indian tribes at their own initiative to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act, to submit CAA programs for specified provisions and to request federal financial assistance as described elsewhere in this preamble. Further, the rule calls for the minimum information necessary to effectively evaluate tribal applications for eligibility, CAA program approval and federal financial assistance. Thus, EPA has attempted to minimize the burden for any tribe that chooses to participate in the programs provided in this rule.

The regulation will not have a significant impact on a substantial number of small businesses. Any additional economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of these activities is limited to areas within reservations and non-reservation areas within tribal jurisdiction and, in any event, EPA has regulated or may regulate these activities in the absence of tribal CAA programs.

The regulation will not have a significant impact on a substantial number of small organizations for the same reasons that the regulation will not have a significant impact on a substantial number of small businesses.

Accordingly, I certify that this regulation will not have a significant economic impact on a number of small entities.

C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act

EO 12875 is intended to reduce the imposition of unfunded mandates upon state, local and tribal governments. To that end, it calls for federal agencies to refrain, to the extent feasible and permitted by law, from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless funds for complying with the mandate are provided by the federal government or the Agency first consults with affected state, local and tribal governments.

The issuance of this rule is required by statute. Section 301(d) of the CAA directs the Administrator to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes as states. Moreover, this rule will not place mandates on Indian tribes. Rather, as discussed in section IV.B above, this rule

authorizes or enables tribes to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act and to submit CAA programs for the provisions specified by the Administrator. Further, the rule also explains how tribes seeking to develop and submit CAA programs to EPA for approval may qualify for federal financial assistance.

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, signed into law on March 22, 1995, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under sections 202 and 205 of the UMRA, EPA generally must prepare a written statement of economic and regulatory alternatives analyses for proposed or final rules with federal mandates, as defined by the UMRA, that may result in expenditures to state, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. The section 202 and 205 requirements do not apply to today's action because it is not a "Federal Mandate" and because it does not impose annual costs of $100 million or more.

Today's rule contains no federal mandates for state, local or tribal governments or the private sector for two reasons. First, today's action does not impose any enforceable duties on any state, local or tribal governments or the private sector. Second, the Act also generally excludes from the definition of a "federal mandate" duties that arise from participation in a voluntary federal program. As discussed above and in Section IV.B., the rule that is being promulgated today merely authorizes eligible tribes to seek, at their own election, approval from EPA to implement CAA programs for the provisions specified by the Administrator. Moreover, EPA has regulated or may regulate these activities in the absence of Tribal CAA programs.

Even if today's rule did contain a federal mandate, this rule will not result in annual expenditures of $100

million or more for state, local, and tribal governments, in the aggregate, or the private sector. This rule only addresses CAA authorizations that pertain to tribal governments, not to state or local governments, and calls for tribal governments to submit the minimum information necessary to effectively evaluate applications for eligibility and CAA program approval. The rule also explains how tribes seeking to develop and submit CAA programs for approval may qualify for federal financial assistance and, thus, minimize any economic burden. Finally, any economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of CAA activities is limited to reservation areas and non-reservation areas over which a tribe can demonstrate jurisdiction.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, section 203 of the UMRA requires EPA to develop a plan for informing and advising any small government. EPA consulted with tribal governments periodically throughout the development of the proposed rule, and met directly with tribal representatives at three major outreach meetings. Since issuance of the proposed rule, EPA also received extensive comments from, and has been in communication with, tribal governments regarding all aspects of this rule. The Agency is also committed to providing ongoing assistance to tribal governments seeking to develop and submit CAA programs for approval.

D. Paperwork Reduction Act

OMB has approved the information collection requirements pertaining to grants applications contained in this rule under the provisions of the Paperwork Reduction

Act, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2030-0020.

This collection of information pertaining to the grants application process has an estimated reporting burden averaging 29 hours per response and an estimated annual record keeping burden averaging 3 hours per respondent. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The Office of Management and Budget has also approved the information collection requirements pertaining to an Indian tribe's application for eligibility to be treated in the same manner as a state or "treatment as state" as provided by this rule under the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2060-0306. This rule provides that each tribe voluntarily choosing to apply for eligibility is to meet eligibility by demonstrating it: (1) Is a federally recognized tribe; (2) has a governing body carrying out substantial governmental duties and powers; and (3) is reasonably expected to be capable of carrying out the program for which it is seeking approval in a manner consistent with the CAA and applicable regulations. If a tribe is asserting jurisdiction over non-reservation areas, it must demonstrate that the legal and factual basis for its jurisdiction is consistent with applicable principles of federal Indian law.

This collection of information for treatment in the same manner as states to carry out the Clean Air Act has an estimated reporting burden of 20 annual responses, averaging 40 hours per response and an estimated annual record keeping burden averaging 800 hours. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. EPA is amending the table in 40 CFR Part 9 of currently approved ICR control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 35

Environmental protection, Air pollution control, Coastal zone, Grant programs—environmental protection, Grant programs—Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

40 CFR Part 49

Environmental protection, Air pollution control, Administrative practice and procedure, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 50

Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: February 3, 1998.
Carol M. Browner,
Administrator.

For the reasons set out in the Preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below:

PART 9 – OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 et seq., 136-136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601-2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 et seq., 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971-1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-1, 300j-2, 300j-3, 300j-4, 300j-9, 1857 et seq., 6901-6992k, 7401-7671q, 7542, 9601-9657, 11023, 11048.

2. In § 9.1 the table is amended by adding a heading and entries in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB Control No.

* * * * *

Indian Tribes:

Air Quality Planning and Management

49.6.....2060-3060
49.7.....2060-3060

* * * * *

PART 35—STATE AND LOCAL ASSISTANCE

3. The authority cite for part 35, subpart a, continues to read as follows:

Authority: Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a)); Secs. 106, 205(g), 205(j), 208, 319, 501(a), and 518 of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1361(a) and 1377); secs. 1443, 1450, and 1451 of the Safe Drinking Water Act (42 U.S.C. 300j-2, 300j-9 and 300j-11); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, and 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(b), 136(u) and 136w(a)).

4. Section 35.105 is amended by revising the definitions for "Eligible Indian Tribe," "Federal Indian Reservation," and the first definition for "Indian Tribe," and by removing the second definition for "Indian Tribe" to read as follows:

§ 35.105 Definitions.

Eligible Indian Tribe means:

(1) For purposes of the Clean Water Act, any federally recognized Indian Tribe that meets the requirements set forth at 40 CFR 130.6(d); and

(2) For purposes of the Clean Air Act, any federally recognized Indian Tribe that meets the requirements set forth at Sec. 35.220.

Federal Indian Reservation means for purposes of the Clean Water Act or the Clean Air Act, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Indian Tribe means:

(1) Within the context of the Public Water System Supervision and Underground Water Source Protection grants, any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over a defined area.

(2) For purposes of the Clean Water Act, any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

(3) For purposes of the Clean Air Act, any Indian Tribe, band, nation, or other organized group or community, including any Alaskan Native Village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

* * * * *

5. Section 35.205 is amended by adding new paragraphs (c), (d), and (e) to read as follows:

§ 35.205 Maximum Federal share.

* * * * *

(c) For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 95 percent of the approved costs of maintaining that program. After two years from the date of each Tribe's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its share. The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of February 12, 1998. For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may increase the maximum federal share if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(d) The Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or approving an air pollution control program and up to 95 percent of the approved costs of maintaining that program to an intertribal agency of two or more Tribes that have established eligibility pursuant to § 35.220(a), which has substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act, when such intertribal agency is authorized by the governing bodies of those Tribes to apply for and receive financial assistance. After two years

from the date of each intertribal agency's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the tribal members of the intertribal agency meet certain economic indicators that would provide an objective assessment of the Tribes' ability to increase the non-federal share. For intertribal agencies made up of Indian Tribes establishing eligibility pursuant to § 35.220(a), which have substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act, the Regional Administrator may increase the maximum federal share if the intertribal agency can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the member Tribes are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(e) The Regional Administrator may provide financial assistance in an amount up to 60 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to sixty percent of the approved costs of maintaining that program to Tribes that have not made a demonstration that they are eligible for treatment in the same manner as a state under 40 CFR 49.6, but are eligible for financial assistance under § 35.220(b).

6. Section 35.210 is amended by adding paragraph (c) to read as follows:

§ 35.210 Maintenance of effort.

* * * * *

(c) The requirements of paragraphs (a) and (b) of this section shall not apply to Indian Tribes that have established eligibility pursuant to § 35.220(a) and intertribal agencies made up of such Tribes.

7. Section 35.215 is revised to read as follows:

§ 35.215 Limitations.

(a) The Regional Administrator will not award section 105 funds to an interstate, intertribal or intermunicipal agency which does not provide assurance that it can develop a comprehensive plan for the air quality control region which includes representation of appropriate state, interstate, tribal, local, and international interests.

(b) The Regional Administrator will not award section 105 funds to a local, interstate, intermunicipal, or intertribal agency without consulting with the appropriate official designated by the Governor or Governors of the state or states affected or the appropriate official of any affected Indian Tribe or Tribes.

(c) The Regional Administrator will not disapprove an application for or terminate or annul an award of section 105 funds without prior notice and opportunity for a public hearing in the affected state or area within tribal jurisdiction or in one of the affected states or areas within tribal jurisdiction if several are affected.

8. Section 35.220 is added just before the center heading "Water Pollution Control (section 106)" to read as follows:

§ 35.220 Eligible Indian Tribes.

The Regional Administrator may make Clean Air Act section 105 grants to Indian Tribes establishing eligibility under paragraph (a) of this section, without requiring the same cost share that would be required if such grants were made to states. Instead grants to eligible Tribes will include a tribal cost share of five percent for two years from the date of each Tribe's initial grant award. After two years, the

Regional Administrator will increase the tribal cost share to ten percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its cost share. Notwithstanding the above, the Regional Administrator may reduce the required cost share of grants to Tribes that establish eligibility under paragraph (a) of this section if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(a) An Indian Tribe is eligible to receive financial assistance if it has demonstrated eligibility to be treated in the same manner as a state under 40 CFR 49.6.

(b) An Indian Tribe that has not made a demonstration under 40 CFR 49.6 is eligible for financial assistance under 42 U.S.C. 7405 and 7602(b)(5).

(c) The Administrator shall process a application for financial assistance under this section in a timely manner.

9. Part 49 is added to read as follows:

PART 49—TRIBAL CLEAN AIR ACT AUTHORITY

Sec.

49.1 Program overview.
49.2 Definitions.
49.3 General Clean Air Act authority.
49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
49.6 Tribal eligibility requirements.

49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.
49.8 Provisions for tribal criminal enforcement authority.
49.9 EPA review of Clean Air Act applications.
49.10 EPA review of state Clean Air Act programs.
49.11 Actions under section 301(d)(4) authority.

Authority: 42 U.S.C. 7401, *et seq.*

§ 49.1 Program overview.

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as states. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as states under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

§ 49.2 Definitions.

(a) *Clean Air Act* or *Act* means those statutory provisions in the United States Code at 42 U.S.C. 7401, *et seq.*

(b) *Federal Indian Reservation, Indian Reservation or Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) *Indian tribe or tribe* means any Indian tribe, band, nation, or other organized group or community, including

any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) *Indian Tribe Consortium or Tribal Consortium* means a group of two or more Indian tribes.

(e) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§ 49.3 General Tribal Clean Air Act authority.

Tribes meeting the eligibility criteria of § 49.6 shall be treated in the same manner as states with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions.

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Tribes will not be treated as states with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific

deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) & (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The "2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule

assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the federal district courts against states in their capacity as states.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be "judicial" and "in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be "judicial" and "in State court."

(q) The provision of section 105(a)(1) that limits the maximum federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

Sec. 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as states. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as states with respect to such provisions.

§ 49.6 Tribal eligibility requirements.

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian tribe in the same manner as a state for the Clean Air Act provisions identified in Sec. 49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

§ 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of § 49.6 for Clean Air Act program approval.

The application shall concisely describe how the Indian tribe will meet each of the requirements of § 49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For tribal applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws,

charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in

demonstrating under paragraph (a)(4) of this section that the tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with § 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of § 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

§ 49.8 Provisions for tribal criminal enforcement authority.

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the federal government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in § 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

§ 49.9 EPA review of tribal Clean Air Act applications.

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under § 49.7 in a timely manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-

reservation areas, appropriate governmental entities may request a single 30-day extension to the general 30-day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of § 49.6 for purposes of a Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a state with respect to that provision, to the extent that the provision is identified in § 49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in § 49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar state submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

§ 49.10 EPA review of state Clean Air Act programs.

A state Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

§ 49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air

pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

10. The authority citation for part 50 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

11. Section 50.1 is amended by adding paragraph (i) to read as follows:

§ 50.1 Definitions.

* * * * *

(i) *Indian country* is as defined in 18 U.S.C. 1151.

12. Section 50.2 is amended by revising paragraphs (c) and (d) to read as follows:

§ 50.2 Scope.

* * * * *

(c) The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any state or Indian country.

(d) The proposal, promulgation, or revision of national primary and secondary ambient air quality standards shall not prohibit any state or Indian tribe from establishing ambient air quality standards for that state or area under a CAA program or any portion thereof which are more stringent than the national standards.

* * * * *

PART 81--DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

13. The authority citation for part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

14. Section 81.1 is amended by revising paragraph (a) and adding new paragraphs (c), (d) and (e) to read as follows:

§ 81.1 Definitions.

* * * * *

(a) *Act* means the Clean Air Act as amended (42 U.S.C. 7401, *et seq.*).

* * * * *

(c) *Federal Indian Reservation, Indian Reservation or Reservation* means all land within the limits of any Indian

reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(d) *Indian tribe* or *tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(e) *State* means a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

Subpart C—Section 107 Attainment Status Designations

15. The authority citation for subpart C, part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 81.300 [Amended]

16. Section 81.300(a) is amended by revising the third sentence to read "A state, an Indian tribe determined eligible for such functions under 40 CFR part 49, and EPA can initiate changes to these designations, but any proposed state or redesignation must be submitted to EPA for concurrence."

[FR Doc. 98-3451 Filed 2-11-98; 8:45 am]

APPENDIX C

[Filed: July 12, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

BEFORE: Edwards, Chief Judge, Ginsburg and Rogers, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of the State of Michigan, et al. filed June 19, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D

[Filed: July 12, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc of the State of Michigan, et al., and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

[Mandate Issued: July 27, 2000]
/s/ E. Brown Deputy Clerk
[Filed May 5, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

On Petitions for Review of an Order of the
Environmental Protection Agency

Before: EDWARDS, *Chief Judge*, GINSBURG and ROGERS, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petitions for review are denied in part and dismissed in part, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: May 5, 2000

Opinion for the Court filed by Chief Judge Edwards.
Opinion concurring in part and dissenting from Part II.A. filed by Circuit Judge Ginsburg.

APPENDIX F

Excerpts from the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*

* * * *

§ 7410. State implementation plans for national primary and secondary ambient air quality standards [CAA § 110]

* * * *

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 760 (d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

* * * *

§ 7474. Area redesignation [CAA § 164]

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems

appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph[1] (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring the State's redesignation;

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[1] So in original. Probably should be "paragraphs".

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subjection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended

notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian

governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within[2] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air

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[2] So in original. Probably should be "with".

quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

* * * *

§ 7601. Administration [CAA § 301]

* * * *

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator—

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat

Indian tribes as States. Such treatment shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

Excerpts from the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*

§ 461. Allotment of land on Indian reservations [IRA § 1]

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

* * * *

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption [IRA § 5]

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * * *

§ 467. New Indian reservations [IRA § 7]

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the executive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

(3)

No. 00-746

Supreme Court, U.S.
FILED
DEC 11 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS GILA RIVER INDIAN COMMUNITY, NAVAJO NATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND SHOSHONE-BANNOCK TRIBES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 301(d) of the Clean Air Act ("CAA"), 42 U.S.C. §7601(d), App. 146a-147a, requires the U.S. Environmental Protection Agency ("EPA") to promulgate a rule specifying the provisions of the CAA for which it is appropriate to treat Indian tribes in the same manner as states under the Act, and authorizes such treatment "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Was the U.S. Court of Appeals for the D.C. Circuit correct in upholding EPA's final rule, which is subject to the "arbitrary and capricious" standard of review, where EPA found:

1. that CAA §7474, App. 141a-146a, which by 1977 already provided that tribes were the only authorities who could "redesignate" lands within "reservations," should be interpreted under §7601(d) (added to the CAA in 1990) to allow tribes to redesignate not only formal reservations and trust lands but also "other areas within the tribe's jurisdiction"; and

2. that CAA §7601(d), which clearly distinguishes between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction," constitutes a delegation of authority to tribes to regulate air quality within the reservation, especially since the legislative history supports this interpretation and the CAA's purpose of achieving and maintaining air quality is best accomplished by allowing tribes regulatory authority over their entire territories rather than subjecting those territories to differing regulatory regimes?

LIST OF PARTIES

1. The following were petitioners in the proceeding in the U.S. Court of Appeals for the D.C. Circuit, and join in this petition:

   In 98-1203, the National Association of Manufacturers, the Michigan Chemical Council, the Timber Producers Association of Michigan and Wisconsin, Inc., and the Rhinelander Area Chamber of Commerce, Inc.

   In 98-1207, Salt River Project Agricultural Improvement and Power District and Public Service Company of New Mexico.

2. The following were petitioners in the D.C. Circuit proceeding, and do not join in this petition:

   In 98-1196, Arizona Public Service Company.

   In 98-1203, the American Forest & Paper Association.

   In 98-1206, the National Mining Association.

   In 98-1207, Nevada Power Company and Tucson Electric Power Company.

   In 98-1208, Oklahoma Gas and Electric Company.

   In 98-1209, the State of Oklahoma.

3. The following was an intervenor on behalf of petitioners in the D.C. Circuit proceeding, and joins in this petition:

   The State of Michigan

4. The following was an intervenor on behalf of petitioners in the D.C. Circuit proceeding, and does not join in this petition:

   Central and South West Services, Inc.

5. The following was respondent in the D.C. Circuit proceeding, and is respondent in this proceeding:

   The U.S. Environmental Protection Agency.

6. The following were intervenors on behalf of respondent in the D.C. Circuit proceeding, and are respondents in this proceeding:

   The Gila River Indian Community, the Navajo Nation, the Salt River Pima-Maricopa Indian Community and the Shoshone-Bannock Tribes.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Gila River Indian Community, Navajo Nation, Salt River Pima-Maricopa Indian Community and Shoshone-Bannock Tribes respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the D.C. Circuit in this case. That decision is reported as *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (2000), *reh. and reh. en banc denied* (July 12, 2000), App. 1a, 135a, 137a.

STATEMENT OF THE CASE

This case involves review of a rule issued by the Environmental Protection Agency ("EPA") pursuant to the 1990 Amendments to the Clean Air Act ("CAA"). On February 12, 1998, EPA promulgated the Tribal Authority Rule ("TAR"), 63 Fed. Reg. 7254, App. 50a, in order to comply with CAA §301(d), 42 U.S.C. §7601(d), App. 146a. Section 7601(d)(1)(A) authorizes the EPA Administrator to "treat Indian tribes as States" under the CAA, providing that tribes may, but are not required to, apply to EPA for approval to manage CAA programs. Section 7601(d) also requires EPA to promulgate a rule (the TAR) specifying the provisions of the CAA for which it is appropriate to treat tribes in the same manner as states, and sets forth the circumstances under which such treatment is authorized. In their petition for a writ of certiorari, petitioners question two aspects of the TAR: first, EPA's finding that tribes may make "redesignations" for all areas within their jurisdiction, not just for reservation areas, and second, EPA's interpretation of §7601(d) as a statutory delegation of authority to tribes to implement air quality pro-

grams within reservations. Petitioners appear to subsume within these two issues the question of whether the term "reservation" includes all lands held in trust for tribes, including trust lands that have not formally been declared reservations.

Proceedings Below

Thirteen parties filed six petitions for review challenging the TAR on six different grounds, itemized in the D.C. Circuit's opinion, 211 F.3d at 1283-84, 1286-87, App. 3a, 9a-10a; the petitions were consolidated, and two additional parties intervened in the consolidated proceeding on behalf of petitioners. Since the TAR is a "nationally applicable regulation," the petitions were required to be filed in the D.C. Circuit. 42 U.S.C. §7607-(b). The four Indian tribes filing this brief intervened on behalf of EPA. Two days before oral argument, petitioners also filed a motion for vacatur and remand of a portion of the TAR. The D.C. Circuit upheld the TAR on all grounds, stating that "We find petitioners' challenges to be mostly meritless." 211 F.3d at 1284, App. 3a. The decision was unanimous with regard to all issues except the delegation issue referred to above. Even on this issue, the dissenting judge agreed that "the 1990 Amendments do contain an express delegation of authority over fee lands and rights of way" and disagreed only as to which provision of the CAA created that delegation. 211 F.3d at 1301, App. 40a.

Petitions for rehearing and rehearing *en banc* were denied. Under Fed. R. App. P. 35(a), an *en banc* rehearing "ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." No member of

the court requested a vote as to whether the case should be reheard *en banc*. App. 138a. Of the fifteen parties who challenged the TAR in the D.C. Circuit, only seven have petitioned this Court for a writ of certiorari.[1] Arizona Public Service Company ("APS"), the named petitioner below, is not one of the parties petitioning this Court; petitioners have replaced APS in the caption with the State of Michigan, an intervenor below.[2]

Statutory and Regulatory Background

The "treatment as a state" provision in §7601(d) is by no means unique. On the contrary, the provision is one of several provisions added to the Safe Drinking Water Act ("SDWA"), Clean Water Act ("CWA") and CAA in the past 15 years providing a regulatory and enforcement role for tribes under these environmental statutes. *See* Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339; Clean Water Act Amendments of 1987, Pub. L. No. 100-4; Clean Air Act Amendments of 1990, Pub. L. No. 101-549.[3] In particular, "treatment

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[1] The State of Oklahoma voluntarily dismissed its petition for review of the TAR after EPA issued guidance clarifying application of the TAR in Oklahoma.

[2] Although the State of Michigan appears in the caption, petitioners' counsel of record is in fact counsel for the two electric utility petitioners in this case and not for Michigan. Moreover, no Michigan tribes have intervened in this proceeding, and no Michigan tribes have received CAA §105 eligibility or other approvals for CAA programs.

[3] Such amendments were enacted as a result of policies regarding tribal self-government and government-to-government consultation and in light of a growing awareness of principles of federal Indian law. *See, e.g.*, S.R. No. 101-228 at 79, 1990 U.S.C.C.A.N. 3385, 3465.

as a state" provisions were added to the SDWA and CWA several years prior to the addition of §7601(d) to the CAA. SDWA §1451, 42 U.S.C. §300j-11 (added in 1986); CWA §518(e), 33 U.S.C. §1377(e) (added in 1987). All three of these "treatment as a state" provisions authorize federally recognized tribes to implement programs under the respective statute, subject to the approval of EPA and as long as the tribe meets three criteria: the tribe must (1) have a governing body "carrying out substantial governmental duties and powers;" (2) demonstrate jurisdiction with regard to the area over which the tribe intends to implement the environmental program in question; and (3) have the capability to implement that program.

The only significant difference between the three "treatment as a state" provisions relates to the wording of the jurisdictional requirement. Whereas the SDWA provides generally for tribal regulation "within the area of the Tribal Government's jurisdiction," 42 U.S.C. §300j-11, and the CWA provides specifically for tribal regulation "within the borders of an Indian reservation," 33 U.S.C. §1377(e), the CAA provides for both, declaring that a tribe may regulate "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction," 42 U.S.C. §7601(d)(2)(B). This distinction is the basis for the statutory delegation discussed by EPA in the TAR, upheld by the D.C. Circuit, and raised here by petitioners.

Not surprisingly, in light of this statutory background, EPA's TAR under the CAA is in many respects identical to the "treatment as a state" rules issued by EPA under both the CWA and the SDWA.[4] All these rules lay out

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[4] *Compare* 59 Fed. Reg. 43956 (Aug. 25, 1994) (proposed TAR), 63 Fed. Reg. 7254 (Feb. 12, 1998) (final TAR); 54 Fed.

[footnote continued]

essentially the same criteria that tribes must meet to be eligible to implement the statutory programs within their reservations. More specifically, in discussing the jurisdictional requirement, the rules that define the term "reservation" interpret it to include "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." TAR, 63 Fed. Reg. at 7258, App. 67a. *Accord* 56 Fed. Reg. at 64881; 58 Fed. Reg. at 67970, 67976. Thus, one of the main issues raised by petitioners – EPA's definition of "reservation" – is not unique to the TAR. The "treatment as a state" rules under the CWA and SDWA never were challenged in court.

Petitioners' other issue concerns EPA's finding that CAA §7474, App. 141a-146a, the redesignation provision, is one of the provisions for which it is appropriate to treat tribes as states under §7601(d)(2). Section 7474, added in 1977, already provided for tribal redesignation of reservations. The TAR extends this authority to "other areas within the tribe's jurisdiction," based on the language of §7601(d)(2)(B). The D.C. Circuit found that petitioners' attempt to argue otherwise "falls flat." 211 F.3d at 1295, App. 27a.

EPA's action in promulgating the TAR under the CAA, moreover, has nothing whatsoever to do with the taking of land into trust under the Indian Reorganiza-

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Reg. 39098 (Sept. 22, 1989) (proposed rule under CWA §518(e), regarding §§303, 401), 56 Fed. Reg. 64876 (Dec. 12, 1991) (final rule); 57 Fed. Reg. 8522 (March 10, 1992) (proposed rule under CWA §518(e), regarding §§308, 309, 401, 402 and 405), 58 Fed. Reg. 67966 (Dec. 22, 1993) (final rule); 52 Fed. Reg. 28112 (July 27, 1987) (proposed rule under SDWA §1451), 53 Fed. Reg. 37396 (Sept. 26, 1988) (final rule).

tion Act, 25 U.S.C. §461 *et seq.* ("IRA"), despite petitioners' attempts to confuse and commingle the two statutes. The taking of land into trust is subject not only to an entirely different statute but to an entirely different regulatory scheme, administered by the Department of the Interior, not the EPA. Part 151 of 25 C.F.R. establishes specific procedures for the taking of land into trust which require an opportunity for comment by states and local governments, 25 C.F.R. §151.11(d), and take a number of factors into account.[5] Petitioners' attempt to conflate these two statutes and regulatory schemes not only is incorrect but results in misleading and inaccurate statements and implications in petitioners' brief, which respondents are obliged to correct. Sup. Ct. R. 15.1. Once these misstatements are corrected, it is even more apparent that petitioners do not raise any issues warranting review by this Court.

First, the TAR does not permit tribes to regulate air quality over lands that would otherwise be subject to state jurisdiction, despite petitioners' implications to the contrary. *See* Pet. Br. at 2, 5, 12-13, 20-21. The TAR authorizes tribal regulation of air quality over trust lands (subject to the conditions set forth in the CAA and the rule itself). Trust lands have always been viewed as "Indian country" subject to tribal and federal – but not state – jurisdiction, as the D.C. Circuit recognized. 211 F.3d at 1294 (citing *United States v. John*, 437 U.S. 634 (1978); *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000); *United States v. Azure*, 801 F.3d 336 (8th Cir. 1986); *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985)), App. 25a; *accord, Oklahoma Tax Comm'n*

[5] For example, the distance of a parcel from existing tribal lands is one factor that can prevent the Secretary of the Interior from taking land into trust. 25 C.F.R. §151.11(b).

v. Sac & Fox Nation, 508 U.S. 114 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). The question of whether a certain parcel of land should be taken into trust, pursuant to the IRA or by legislation, is an entirely different question which has nothing to do with the CAA and certainly not with the TAR.

Second, although there are certainly instances of checkerboarding within reservations, Pet. Br. at 3, this is far from true of all, or even the majority, of reservations. Of the approximately 16.5 million acres of reservation land that comprise the Navajo Indian Reservation, the Gila River Indian Reservation and the Salt River Indian Reservation (the reservations of three of the tribal respondents in this proceeding), less than 1% is fee land. Of the half million acres that comprise the Fort Hall Indian Reservation, occupied by the Shoshone-Bannock Tribes, the fourth tribal respondent, only about 4% is fee land. Moreover, the Gila River Indian Community, the Navajo Nation and the Shoshone-Bannock Tribes are among the few tribes which have received "treatment as a state" under §105 of the CAA, 42 U.S.C. §7405, which provides for grants for implementing tribal air programs. Because of the complexity of CAA programs and the lack of major sources in Indian country, it is unlikely that many tribes will submit Section 105 applications, at least in the foreseeable future.

Finally, trust lands typically are not miles from reservations, nor are they proliferating yearly. Pet. Br. at 13. A recent compilation of data on trust lands indicates 40 percent of all trust applications were *denied* in 1996.[6]

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[6] Fact Sheet issued by the Bureau of Indian Affairs, Division of Real Estate Services, June 25, 1997 ("BIA Fact Sheet") at 3, Respondents' Appendix ("R.App.") at A-1, A-5.

For the four-year period from 1992 to 1995, a total of 215,000 acres was taken into trust by the Secretary of the Interior, or an average of less than 54,000 acres a year, a portion of which was congressionally mandated and not subject to the discretion of the Secretary.[7] However, in 1996 alone, some 130,000 acres passed *out* of trust through sales to non-Indians, foreclosures, devise by testamentary instruments, and other similar means.[8] That tribes are now seeking to acquire more trust lands, largely to fulfill tribes' objectives of consolidating their former reservations by purchase and acquisition of non-Indian fee in-holdings, should be neither surprising nor cause for concern, despite the alarmist descriptions in petitioners' brief.

REASONS FOR DENYING THE WRIT

Under the CAA, review of nationally applicable rules like the TAR may be heard only in the D.C. Circuit, so that there can be no conflicts within the circuits regarding the TAR. Petitioners' claim of a conflict with the Ninth Circuit regarding EPA's interpretation in the TAR of the term "reservation" is therefore unfounded. The Ninth Circuit was not even aware of the TAR at the time it issued the decision in question, and in fact remanded to EPA the question of whether certain lands constituted "reservation" under the CAA.

Petitioners' claim that the TAR divests states of their rightful jurisdiction is also unfounded. Tribes have always had regulatory jurisdiction over trust lands, to the exclusion of states; moreover, the TAR, by interpreting "reser-

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[7] *Id.* at 1, R.App. at A-2.

[8] *Id.* at 2, R.App. at A-3.

vation" to include such trust lands, reflects existing federal Indian law. Similarly, tribes have always had regulatory jurisdiction over their reservations, and under the "health and welfare" exception in *Montana v. United States*, 450 U.S. 544 (1981), tribes have jurisdiction to regulate air quality over non-Indian fee lands within their reservations as well. In addition, although the issue is not in fact raised by this case, there are significant restraints on the Secretary of the Interior's discretion to take lands into trust, as well as limits on a tribe's authority to redesignate small parcels of land. Finally, the TAR does not expand the impacts of tribal redesignations on states, since tribes had the authority to redesignate their reservations prior to the TAR, and the impacts of any such redesignations always could extend beyond reservation boundaries, due to the very nature of air quality regulation. The TAR does not, therefore, result in any extension of tribal jurisdiction.

The D.C. Circuit's decision also was correct on the merits, especially in light of the limited scope of review of EPA's rule. EPA's interpretation of the redesignation provision as extending to all areas of a tribe's jurisdiction is consistent with the CAA and entitled to deference. Likewise, EPA's interpretation of the term "reservation" is consistent with an extensive body of case law and is entitled to deference. EPA's interpretation of the CAA as a statutory delegation of regulatory authority to tribes within their reservations comports with the statutory language and purposes and with legislative intent.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUES RAISED BY PETITIONERS.

As petitioners themselves point out, Pet. Br. at 12, there can be no conflict among the circuits regarding the TAR because the CAA provides for review of all nationally applicable rules and other final actions in the D.C. Circuit. 42 U.S.C. §7607(b)(1). Petitioners then turn around and claim that EPA's interpretation of "reservation" in the TAR, which the D.C. Circuit upheld, conflicts with the Ninth Circuit's decision in *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (1999). Pet. Br. at 21. In fact, the court in *Arizona* did not reach the question of what constitutes a reservation, nor did it consider any aspect of the TAR.

The *Arizona* decision involved a challenge to an EPA approval of a request from the Yavapai-Apache Tribe for redesignation of its reservation under CAA §7474, App. 141a. Petitioners in that case stipulated that a particular parcel of land (the "Middle Verde" parcel) constituted a reservation, but disagreed as to four other parcels for which the tribe sought redesignation. The *Arizona* court stated that there was "insufficient evidence in the record to support a finding that these parcels have been declared to be reservations . . . or . . . have been added to the Middle Verde reservation by proclamation." 151 F.3d at 1210. Petitioners argue that because the lands in question were trust lands, the court must have ruled that trust land may not be considered reservation land. In fact, however, the court refrained from making any ruling with regard to these parcels, instead remanding to EPA "to determine whether the parcels are reservations." 170 F.3d at 870.

It is also abundantly clear that the Ninth Circuit in *Arizona* did not consider EPA's interpretation of "reservation" in the TAR, since the court was unaware that EPA had promulgated the rule. *Id.* at 1212 ("EPA has failed to act as directed by Congress to promulgate [the TAR]").[9]

Moreover, the dissent, which would have reached a decision on the reservation issue, noted that EPA's determination that the land was part of a reservation was consistent with judicial precedent that trust lands may be considered reservation. The dissent then stated, "Given these decisions, the EPA's determination that the Tribe's lands were reservations is permissible and should be explicitly upheld." 151 F.3d at 1214. This statement is consistent with the D.C. Circuit decision below; indeed, the dissenting judge relied on two of the same cases cited by the D.C. Circuit.

II.
THE TAR DOES NOT RESULT IN AN ENCROACHMENT ON STATE JURISDICTION.

In an effort to justify the grant of a writ in this proceeding, petitioners attempt to elevate the importance of this relatively routine administrative rulemaking to the level of a crisis by misconstruing EPA's action as a dramatic departure from existing precedent and a significant threat to states. In fact, the TAR does not significantly alter the extent of tribal jurisdiction; rather, it reflects the existing state of federal Indian law. Moreover, the TAR does not expand the impacts of tribal air quality regulation: the very nature of air quality means that regulations will have impacts on bordering jurisdictions,

[9] EPA had in fact recently issued the rule, but for whatever reason this seems to have been overlooked by the court.

whether it be tribal impacts on states, state impacts on tribes, or state impacts on other states, as petitioners themselves point out. Pet. Br. at 14-15.

A. The TAR Does Not Extend the Scope of Tribal Jurisdiction.

In the final analysis, the TAR does not give tribes jurisdiction that they would not have under existing precedent of this Court. Off-reservation lands held in trust for tribes have been determined by the courts to be "Indian country" under 18 U.S.C. §1151(a) ("all land within the limits of any Indian reservation"), and therefore subject to tribal (and federal) regulation. Petitioners claim that such jurisdiction will encroach substantially on states, but in reality there are adequate protections not only in the CAA and the TAR but also in the regulations controlling fee-to-trust transfers to ensure that states will not be affected unduly. Finally, tribal jurisdiction over air quality within a reservation's boundaries, including non-Indian fee lands, is consistent with this Court's precedent.

1. Tribes have always had jurisdiction over trust lands.

Based on the precedent of this Court and enactments of Congress, it is indisputable that Indian tribes have regulatory jurisdiction over lands held in trust for them by the United States, regardless of whether those lands are inside or outside the boundaries of any "formal" reservation. In addition, this Court has specifically found that trust lands are equivalent to "reservation" under §1151-(a). Accordingly, EPA's decision to include those lands within the definition of "reservation" in the CAA is consistent with federal Indian law as interpreted by this Court.

Petitioners concede that tribal regulatory authority extends over "Indian country," and that this term is defined by §1151. Pet. Br. at 3. Section 1151 provides:

> "[T]he term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[10]

This Court has found that trust land, which significantly is not mentioned separately under any of the three categories in §1151, is equivalent to an "informal reservation" and thus included within §1151(a). Thus in both *Potawatomi Tribe* and *Sac & Fox Nation* the Court explained that for purposes of determining what is "Indian Country," there is no distinction between trust land and a formal reservation. In rejecting Oklahoma's claim that the state could tax sales to tribal members on trust lands that were not part of a formal reservation, the Court in *Potawatomi Tribe* stated, "[W]e ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' [*United States v. John, 437 U.S. 634*], at 648-649; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938)."[11] *Potawatomi Tribe*, 498 U.S. at 511. Eluci-

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[10] As petitioners note, Pet. Br. at 3 n.1, the definition applies to civil as well as criminal jurisdiction. *E.g., DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S.Ct. 948, 952 (1998).

[11] There is no basis for attempting to distinguish lands taken into trust by the Secretary of Interior under 25 U.S.C. §465 and

[footnote continued]

dating the reasoning in *Potawatomi Tribe*, the Court in *Sac & Fox Nation* stated, "We noted that we have never drawn the distinction [between formal reservations and other lands held in trust] Oklahoma urged."[12] 508 U.S. at 125. Instead, in both cases the Court found the trust land in question to be "reservation" under §1151-(a) and subject to tribal jurisdiction. *Sac & Fox*, 508 U.S. at 123; *Potawatomi Tribe*, 498 U.S. at 511; *accord United States v. John*, 437 U.S. 634, 649 (1978); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 & n.8 (1997) (finding "tribal land" to include lands "held by the United States in trust for the Tribe").

Numerous statutes support the conclusion that Congress also considers trust land to be within a tribe's jurisdiction. For example, as the Court pointed out in *Sac & Fox Nation*, Congress in Pub. L. 280, 28 U.S.C. §1360, required some states to assume, and gave others the option of assuming, civil jurisdiction "in the areas of Indian country situated within such State." 25 U.S.C. §§ 1321(a), 1322(a). *See Sac & Fox Nation*, 508 U.S. at

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other trust lands, as petitioners attempt to do. Pet. Br. at 20-21. Whether taken into trust by Congress directly, or indirectly through the Secretary, trust land is "set apart for the use of the Indians as such, under the superintendence of the Government."

[12] Oklahoma, with its collection of "informal" reservations, is not the only state in which the limitation of tribal jurisdiction to only "formal" reservations would have a profound effect. In New Mexico, for example, many of the Pueblo lands date back to Spanish land grants and are not formal reservations despite predating the United States. They have nevertheless been considered reservations. *See United States v. Sandoval*, 231 U.S. 28 (1913); *see also Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (concluding that Pueblo's "powers inherent in Indian tribal sovereignty" were sufficient to give it regulatory jurisdiction over water quality on Pueblo lands, and construing the Clean Water Act accordingly), *cert. denied*, 522 U.S. 965 (1997).

125. It would be nonsensical for Congress to have given states the opportunity to assume something they already had. *See also* Indian Child Welfare Act, 25 U.S.C. §1903-(10) (defining "reservation" to include all Indian country under §1151 and any trust lands and Indian lands subject to restraints against alienation that are not already covered under §1151).

In the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.*, Congress wrestled with how much authority states should be *given* over the hotly contested area of Indian gaming on Indian lands. For the purpose here, it is most relevant that Congress started with the assumption that absent congressional action, tribes would have regulatory jurisdiction over their lands, including trust lands: "It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to *Indian lands*." S. Rep. No. 100-446, at 5, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. "Indian lands" are defined in the IGRA to include existing trust lands, 25 U.S.C. §2703(4)(B).

Finally, it is interesting to note that the State of Michigan, the lead petitioner before the Court, also recognizes tribal jurisdiction over off-reservation trust lands. For example, in a Michigan statute relating to Indian Housing Authorities, the definition of "Indian reservation" is illuminating: " 'Indian reservation' means an Indian community which has land held in trust for the Indian community by the federal or state government, or a local unit of government, or which owns the land in its own name." M.S.A. 5.2950(51)(b).

Both the precedents of this Court and enactments by Congress make it clear that lands held in trust for Indians by the United States are equivalent to "reservation," and are subject to tribal regulatory authority. Accordingly, tribes have always had the ability to regulate air quality on those lands, and the TAR is completely consistent with existing law in this regard.

2. Petitioners' Fears Regarding Off-Reservation Trust Acquisitions Are Baseless.

In their attempt to make this case appear worthy of granting the writ, petitioners paint a picture in which the Secretary of the Interior is taking far-flung lands into trust indiscriminately, without any curb on his discretion. There is simply no basis in fact or law for this portrayal.

First, the petitioners try to revive the bogeyman of an Eighth Circuit divided-panel decision in 1995. In *South Dakota v. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), the majority held that §5 of the IRA, 25 U.S.C. §465, App. 148a-149a, was an unconstitutional delegation of congressional authority because it lacked sufficient constraints on the Secretary's discretion. The court went so far as to comment that §465 "would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." 69 F.3d at 878. This Court granted *certiorari* but then vacated the Eighth Circuit opinion and remanded in light of a newly promulgated regulation providing a thirty-day waiting period during which parties could challenge a trust acquisition approval. 519 U.S. 919.

South Dakota is simply irrelevant to this case. There is no trust acquisition that has been challenged. There is not even a particular piece of "IRA trust land" at issue that is upsetting the petitioners. It would be extra-

ordinary for this Court to grant *certiorari* because of a question that is *not* presented. Even if petitioners were right about the "horrors" of §465, the proper course would be to wait until the issue arises in a challenged trust land acquisition, not in a rulemaking by an agency that does not even administer the statute in question.[13]

The petitioners are not right, however, about the effects of §465. First, in a well-reasoned opinion, the Tenth Circuit found that the regulations implementing §465 provide sufficient "law to apply" so that judicial review is available. *McAlpine v. United States*, 112 F.3d 1429 (10th Cir.), *cert. denied*, 522 U.S. 984 (1997). This decision makes it appear likely that the delegation issues in *South Dakota* will be resolved without the need for action by this Court.[14]

Second, the regulations issued by Interior impose significant constraints on trust acquisitions for tribes, contrary to petitioners' claims. Pet. Br. at 20. For off-reservation trust acquisitions, the Secretary must provide notice to local and state governments giving them 30 days to comment, 25 C.F.R. §151.11(d). In addition, the rules provide:

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[13] Even were the delegation doctrine question presented here, there would be an additional reason for the Court's refusing to address the issue now. The BIA is expected to issue a revised 25 C.F.R. Part 151 within the next several months. *See* proposed rule, 64 Fed. Reg. 17574 (April 12, 1999). The final rule is almost certain to constrain the Secretary's discretion even further.

[14] A pre-*South Dakota* case, *Florida Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), had found judicial review unavailable and the Secretary's discretion unconfined. The *McAlpine* court's reasons for disagreeing with the *Florida Dep't of Business Regulation* case are compelling and presumably will be adopted by other circuits, including the Eleventh, that confront the issue.

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised [by state and local governments].

25 C.F.R. §151.11(b). Moreover, the Secretary must consider the statutory authority for the acquisition, the need for the land, the purpose of the acquisition, the tax impact on state and local government, resulting jurisdictional problems, the BIA's ability to discharge its responsibilities if the acquisition is made, and NEPA compliance. 25 C.F.R. §§151.11(a), 151.10(a)-(c), (e)-(h). These are real constraints on the Secretary's discretion and should put the petitioners' claims in perspective, especially since the regulations require increased scrutiny of applications for lands at a distance from reservations.[15]

Data bear out that petitioners' fears are baseless. As mentioned above, 40 percent of trust land applications were denied in 1996, the most recent year for which information is available.[16] For example, the Pascua Yaqui Tribe's application to have 23 acres in the Town of Guadalupe, Arizona taken into trust was ultimately withdrawn after the Town Council objected, even though the Tribe intended only to provide medical facilities and housing for tribal members, who make up 40 percent of

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[15] The IRA itself also imposes constraints on the Secretary's discretion. *See South Dakota*, 69 F.3d at 887-88 (Murphy, J., dissenting).

[16] BIA Fact Sheet, R. App. at A-5.

the Town's population.[17] Near Minneapolis, the regional director of the BIA denied a trust acquisition request by the Shakopee Mdewakanton Sioux Community after objections by state and local officials. As one of his reasons, the regional director explained that trust status for the land was not necessary for the tribe's economic health.[18] As a final example, the trust acquisition request at issue in *McAlpine* was denied in part because the land was not close to the relevant reservation and agency, and because there was insufficient justification for removing the land from local tax rolls. 112 F.3d at 1436-37.

While the BIA does not keep statistical data on whether trust applications and acquisitions are on- or off-reservation, these examples, coupled with the 40 percent denial rate and the regulatory factors, indicate that the petitioners grossly overstate their allegations regarding use of the Secretary's discretion to take land into trust far from reservations. While tribes understandably are eager to recover a small portion of the over 90,000,000 acres of trust land they lost between 1887 and 1934, *Cohen's Handbook of Federal Indian Law* 138 (Strickland *et al.* eds., 1982 ed.), the vast majority of successful trust acquisitions are non-controversial.

Thus, trust acquisitions for tribes are simply not a major concern, factually or legally. The petitioners' attempt to bootstrap a mundane rulemaking into a *cert*-worthy issue by using an inflated description of an issue the Court likely will never need to confront is neither appropriate nor persuasive. In fact, tribes gain modest

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[17] Betty Beard, *Guadalupe Dispute Ends*, ARIZONA REPUBLIC, October 16, 1999, at B1.

[18] Bill Gardner, *Tribe's Bid for Tax-Free Land Status Rejected*, ST. PAUL PIONEER PRESS, October 8, 1998, at 1B.

amounts of much-needed land through off-reservation trust acquisitions, and they have the right under federal Indian law to regulate that land. The EPA did nothing new in the TAR, and petitioners' protests to the contrary are misplaced.

3. Even without an express delegation, tribes would have jurisdiction to regulate air quality over non-Indian fee lands within their reservations.

EPA interprets the CAA as a statutory delegation of authority to tribes to regulate all areas within their reservations, including non-Indian fee lands. Even apart from this statutory delegation, however, tribes already have the inherent authority to regulate air quality within their reservations, under well-established principles of federal Indian law, discussed above. In addition, tribes most likely would have the inherent authority to regulate the air quality of non-Indian fee lands within their reservations, under the second exception in *Montana v. United States*. The CAA's statutory delegation obviates the need for tribes to demonstrate this inherent authority over fee lands under *Montana*, but does not as a practical matter extend the scope of a tribe's authority.

Reservations are one of the categories of "Indian country," *see* 18 U.S.C. §1151(a), and as such there is no question as to a tribe's inherent authority to regulate reservation lands for air quality purposes. When a tribe does not do so, the jurisdiction to regulate falls not to the states but to the federal government. Thus EPA provides in the TAR for federal implementation of CAA programs in instances where tribes are not already administering those programs. 63 Fed. Reg. at 7262-63, App. 85a-90a.

See also S. Rep. No. 101-228 at 80, 1990 U.S.C.C.A.N. at 3466 ("This provision also confirms the Agency's obligation and responsibility to enforce the Act in Indian Country should a tribal government choose not to assume primary enforcement responsibility"). There is therefore no room for state regulation of reservation land, regardless of the TAR.

Tribal authority over non-Indian fee land within reservations is, in contrast, limited. *Montana; see also Strate.* The Court in *Montana* provided two exceptions to this limit on tribal jurisdiction, however, the second of which controls here: the Court held that a tribe may exercise regulatory jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The regulation of air quality clearly falls within this exception.[19]

Indeed, it is difficult to imagine any matter subject to regulation that has a greater impact on the surrounding environs. If tribes are not able to ensure the "health or welfare" of their on-reservation members through regulation of air quality, it is hard to imagine what *would* qualify under the "health or welfare" prong of the second exception. The entire purpose of air quality regulation is health and welfare. Unlike zoning, air quality demands unified treatment over a geographic area. *Cf. Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408 (1989) (split decision allowing

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[19] The first exception – that a tribe has jurisdiction over a nonmember who has a consensual relationship with the tribe – may also be relevant in some instances where air quality regulation is concerned.

tribes to zone non-Indian lands within "closed," but not "open," portion of reservation).[20]

The delegation in the CAA therefore does not change the result regarding tribal regulation. As EPA itself points out,

> Even without this . . . direct grant of authority, Indian tribes would very likely have inherent authority over all activities within reservation boundaries that are subject to CAA regulation. The high mobility of air pollutants, resulting area-wide effects, and the seriousness of such impacts, would all tend to support Tribal inherent authority.

59 Fed. Reg. at 43958. *See also* EPA's Final Rule under CWA §1377(e), in which EPA states that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." 56 Fed. Reg. at 64878. The TAR therefore is not the radical departure from existing law that the petitioners would have the Court believe.

Nor is there any merit to petitioners' argument that this delegation divests states of their authority in violation of CAA §116, 42 U.S.C. §7416. In the first place, states never had the authority to regulate tribal lands, as discussed above. Equally importantly, even if CAA §7601(d) were inconsistent with §7416, it was enacted long after §7416 and therefore would supersede it. *E.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (1938 Mineral Leasing Act overrode 1924 Act); *Moe v. Confed-*

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[20] Only water quality may have a similar effect on the health or welfare of a tribe and, significantly, in its treatment as a state rule under the CWA, EPA found the Act to be "a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts." 56 Fed. Reg. at 64878. In other words, EPA implied that any *Montana* showing required under the CWA would be a mere formality.

erated Salish and Kootenai Tribes, 425 U.S. 463, 472 (1976) (jurisdictional provisions of 28 U.S.C. §1362 overrode restrictions of §1341). *See also United States v. Mazurie,* 419 U.S. 544, 554 (1975) (Congress may delegate authority to tribes "even though the lands [are] held in fee by non-Indians, and even though the persons regulated [are] non-Indians").

B. The TAR Does Not Expand the Impacts of Tribal Air Quality Regulation on States.

Petitioners also complain that tribal redesignations of tribal land will affect development on state lands, but this is a result of air quality regulation in general, not a result of the TAR. Since the air is not confined by political boundaries, and because of the high mobility of air pollutants and resulting area-wide effects of such pollutants, *see* 59 Fed. Reg. at 43958, n.5, regulation by one jurisdiction will unavoidably have impacts on neighboring jurisdictions, as petitioners themselves recognize.

Indeed, the occurrence of interstate (and tribal-state) impacts from air quality regulation is specifically recognized in the Clear Air Act: the Act provides for the establishment of interstate transport regions and commissions, 42 U.S.C. §§7506a, 7611c(a) and visibility transport regions and commissions, §7492, to address just such transboundary impacts from air pollutants. In addition, the Act allows states to petition EPA to address the effects of pollution emitted from other states, §7426, and even provides for cooperation on international effects from air pollution, §7415. All the TAR does is to expand these provisions to apply to tribes as well as

states.[21] In doing so, the TAR makes clear that states are far from "powerless" to address transboundary impacts from tribes, Pet. Br. at 16, since these provisions establish mechanisms for states to work with tribes on such issues, just as they do with other states.

Moreover, petitioners need have no fear of tribes redesignating isolated parcels of land from Class II to Class I. First, before any area may be redesignated, notice must be provided and public hearings conducted in all affected areas and a description and analysis of the impacts of the proposed redesignation must be prepared. 42 U.S.C. §7474; 40 C.F.R. §51.166(g)(2). If there are any disputes between states and tribes regarding a proposed redesignation, the state or tribe may request the Administrator to conduct negotiations to resolve the dispute. §7474(e). In doing so, the Administrator must "consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area," *id.*, making petitioners' fears unlikely to occur.

Finally, it was the 1977 amendments to the CAA which allowed tribes to redesignate their reservations, under §7474(c). Section 7601(d) and the TAR therefore did not create this authority. The TAR simply clarifies that this tribal authority extends to all lands within a tribe's jurisdiction, which may extend beyond the boundaries of a formal reservation. By its own terms, states do not have jurisdiction over lands "within the tribe's jurisdiction." Moreover, states never had the authority to redesignate reservation lands, since such lands always were within Indian country, as defined by 18 U.S.C.

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[21] For example, the Grand Canyon Visibility Transport Commission established under §7492 was expanded to include tribal representation.

§1151, which even petitioners concede defines tribal jurisdiction. Pet. Br. at 3 and n.1. *See also* discussion in Part A above. There is therefore nothing unique about the TAR in this regard, nor does the TAR place any extra burdens on the states.

III.

THE D.C. CIRCUIT DECISION WAS CORRECT ON THE MERITS, ESPECIALLY IN LIGHT OF THE NARROW SCOPE OF REVIEW GOVERNING EPA'S ACTION AND THE DEFERENCE REQUIRED TO BE ACCORDED TO EPA'S INTERPRETATION OF THE STATUTE.

EPA's rulemaking is reviewable under the Administrative Procedures Act, 5 U.S.C. §706(2)(A). The D.C. Circuit therefore was required to uphold the TAR unless it found the rulemaking "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This is a narrow standard of review, under which the court is not empowered to substitute its judgment for the agency's, but must uphold the agency's reasonable decisions. *E.g., Baltimore Gas & Electric Co. v. NRDC,* 462 U.S. 87, 104-05 (1983); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). In addition, in reviewing EPA's interpretation of the CAA, the court correctly employed a *Chevron* analysis, which required it to accord deference to the agency where the statute was ambiguous. 211 F.3d at 1287, App. 54a, citing *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984). In light of these standards and the underlying reasonableness of EPA's action, the D.C. Circuit was correct in upholding the TAR.

A. EPA's Interpretation of the Redesignation Provision and of the Term "Reservation" is Consistent with the Case Law and Principles of Statutory Construction and is Entitled to Deference.

Petitioners' contest EPA's interpretation of 42 U.S.C. §7474, the redesignation provision, as allowing tribes to redesignate areas of tribal jurisdiction outside formal reservation boundaries. Section 7474(c) states that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." As the D.C. Circuit stated, "[a]ll §7474(c) establishes, however, is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in nonreservation areas." 211 F.3d at 1295, App. 27a. EPA therefore looked to §7601(d)(2), the provision governing tribal authority under the CAA, and that provision specifically states that treatment as a state is authorized if "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation *or other areas within the tribe's jurisdiction*." (Emphasis supplied.) EPA therefore provided in the TAR that tribes have the authority to redesignate all lands "within the tribe's jurisdiction," provided they meet both the eligibility criteria in §7601(d)(2) and the redesignation criteria in §7474(c).

EPA's interpretation of the Act was perfectly reasonable, and also followed principles of statutory construction by harmonizing the provisions of the statute. *Commissioner v. Engle*, 464 U.S. 206, 217 (1984); *Commissioner v. Tufts*, 461 U.S. 300, 314 (1983). The D.C.

Circuit was therefore correct to uphold it. To the extent there is any ambiguity in the statute, moreover, the D.C. Circuit was required to accord deference to EPA's interpretation under *Chevron*. Petitioners urge the narrowest possible reading of §7474, but this violates the principle that "statutes should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *E.g., Montana v. Blackfeet Tribe,* 471 U.S. at 766.

Even if the language of §7474(c) were inconsistent with §7601(d), moreover, §7474(c) was added to the CAA in 1977, whereas §7601(d) was added in 1990. The jurisdictional language in §7601(d) would therefore supersede the language of §7474(c). *E.g., Montana v. Blackfeet Tribe; Moe v. Confederated Salish and Kootenai Tribes.*

Section 7474(c) would extend to trust lands in any event by virtue of EPA's separate finding that the term "reservation" includes trust lands outside formal reservation boundaries. Petitioners contend that the term "reservation" as used in the CAA is not ambiguous, and thus that EPA's interpretation is not entitled to deference. This argument is totally spurious, however, since the term is not defined anywhere in the CAA, and the "varying definitions of 'reservation' [in other federal statutes] lay to waste petitioners' argument." 211 F.3d at 1293, App. 24a. EPA's interpretation is supported by an extensive body of case law, as discussed in the D.C. Circuit's opinion.

B. EPA's Finding of a Statutory Delegation Comports with Congressional Intent.

In the matter below, the D.C. Circuit found that:

> The [CAA]'s clear distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be per se within the tribe's jurisdiction. Thus, EPA correctly interpreted §7601(d) to express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation.

211 F.3d at 1288, App. 13a. The D.C. Circuit also found that this interpretation was confirmed by "the statute's . . . purpose, and legislative history." *Id.* at 1288, 1288-89, App. 12a, 13a-15a. In addition, as the D.C. Circuit noted, another federal court has observed that similar language in Clean Water Act §1377(e) regarding tribal jurisdiction over reservation land "seems to indicate plainly that Congress did intend to delegate . . . authority to tribes." *Id.* at 1291, App. 21a, citing *Montana v. EPA*, 941 F. Supp. 945, 951 n.10 & n.12 (D. Mont. 1996). This Court itself has suggested the same. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-28 (1989) (White, J., for the four-justice plurality). The D.C. Circuit thus had every reason to find that "EPA's interpretation comports with congressional intent." 211 F.3d at 1288, App. 12a.

The Ninth Circuit's decision in *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (2000), is not to the contrary. Although that court opines that certain language (the "notwithstanding proviso") may be read automatically as an express delegation, it acknowledges that other lang-

uage may also constitute a statutory delegation, and simply would require further examination. *Id.* at 1219. The D.C. Circuit conducted just such an examination, and found §7601(d)(2) to meet the requirements of a statutory delegation.[22] Moreover, the D.C. Circuit determined that EPS's finding of a statutory delegation was consistent with the purpose of the CAA to "ensure effective enforcement of clean air standards" and to discourage checkerboard jurisdiction within reservations, and also was supported by the legislative history. 211 F.3d at 1288-89, App. 13a-15a. *See also* 63 Fed. Reg. at 7254-55, App. 54a-55a (interpretation of §7601(d) as delegation is supported by territorial approach in CAA to air quality regulation and by legislative history); *cf.* 56 Fed. Reg. at 64878 ("because of the mobile nature of pollutants in surface waters . . . it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on triabal portions"). In *Bugenig*, the court found no support for a delegation in the purpose or legislative history of the statute in question. 229 F.3d at 1215.

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[22] The court in *Bugenig*, in contrast, was faced with a statute that "contains no explicit authorization of jurisdiction, but simply incorporates by reference tribal documents," *id.* at 1219, and thus "does not even reflect on its face any congressional consideration of the proper scope of tribal authority." *id.* at 1218; *see also id.* at 1215 ("The fact that nothing in the Settlement Act itself explicitly confers upon the Tribe jurisdiction to regulate nonmembers raises serious questions as to how carefully Congress considered whether it was making any grant of regulatory authority to the Tribe").

CONCLUSION

The TAR reflects a reasonable interpretation of the CAA, is consistent with existing federal law and raises no issues of extraordinary importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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December 11, 2000

RESPONDENTS' APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

[SEAL]

CORRECTED FACT SHEET

This corrected fact sheet corrects the figures used in question eight of the fact sheet prepared by the Bureau of Indian Affairs, Division of Real Estate Services, dated June 20, 1997, and revises question six.

1. How many acres are held in trust or restricted status on behalf of Indian tribes and individuals?

Nationwide there are approximately 54 million acres of land held in trust or restricted status. This data was obtained from the Bureau of Indian Affairs' (BIA) Annual Report of Indian Lands published in September 1985.

The BIA is currently in the process of compiling the Annual Report of Indian Lands for 1996. This report should be completed by September 1997. Preliminary computations from data furnished by the BIA's 12 Area Offices indicate that for the period 1985, the date of the BIA's last Annual Report, to the end of calendar year 1995 that there was an increase of approximately 2.7 million acres nationwide of trust lands over a ten year period. For the ten year period, this approximates 270,000 acres per year. This figure includes trust acquisitions that were congressionally mandated.

2. What is the difference between land held in trust for a tribe or individual Indian and land held in a restricted status for a tribe of individual Indian?

The title to trust land is held by the United States of America for the use and benefit of the tribe or individual Indian. Legal ownership of the title is vested with the United States and is not subject to taxation.

The title to restricted land is held by the tribe or individual Indian subject to the restriction that it cannot be alienated or encumbered without the consent of the Secretary. Legal ownership of the title is with the tribe or individual Indian and in a majority of the cases is subject to taxes, i.e. gross production taxes on oil and gas derived from restricted lands owned by the Osage and Five Tribes of Oklahoma (Choctaw, Chickasaw, Cherokee, Creek and Seminole).

3. How many acres has the Secretary taken into trust during the past four years?

For the period 1992 through 1995, the Secretary accepted title to approximately 215,000 in trust nationwide for Indian tribes, and includes acres which were congressionally mandated. This computes to approximately 55,000 acres per year. Because the BIA does not maintain records based on the location of the acquired land in relation to the boundaries of the Indian tribes' reservations, we are unable to provide a breakdown of these acres located on or outside the exterior boundaries of the reservation.

4. How many acres of land were placed in trust during 1996?

Although the 1996 Annual Report of Indian Lands is in the process of completion, preliminary figures indicate

that during 1996 that the amount of trust land acquisitions are similar to prior years. However, it is important to point out that approximately 10,000 of the acres acquired in trust in 1996 were congressionally mandated.

5. How many acres of trust land were removed from trust status during calendar year 1996?

Although the 1996 Annual Report of Indian Lands is in the process of completion, preliminary figures indicate that approximately 130,000 acres lost its trust status and became subject to state and local taxation. These lands were lost from trust status due to sales to non-Indians, individual Indians taking a patent-in-fee on their land and, thus, removing the trust status, foreclosures on mortgages of trust land and probates where non-Indians who are not entitled to hold land in trust have inherited by law or devise trust land. It should be pointed out that this acreage loss is only for 1996 as we did not include acres disposed of out of trust for the previous ten years because they were not readily available.

6. How many acres during the last ten years have been taken into trust annually?

The amount has remained fairly stable and averages approximately 250,000 acres per year. If this amount were divided equally among the total number of tribes, approximately 550, each tribe would have acquired approximately 450 acres per year. Although Congressman Istook refers to Indian tribes in total, we excluded the Alaska tribes because they had no applications. Their are approximately 330 Indian tribes in the continental United States. Each tribe would have to acquire approximately 757 acres per year to meet this average. However, all tribes do not apply each year, and some tribes are landless.

7. How many acres of trust land have been lost between enactment of the General Allotment Act of 1887 and the Indian Reorganization Act of June 18, 1934?

Between 1887 and 1934, over 90 million acres passed out of Indian ownership under the allotment policies of the General Allotment Act. The increase of the trust land base of approximately five percent between 1985 to 1996 is minimal when compared to the acres lost to the state and local taxing jurisdictions during the period between 1887 and 1934. Trust acres have and will continue to be removed from trust status for the reasons explained in Question No. 5.

8. What does the 700,000 acres cited in Congressman Istook's letter dated June 9, 1997, represent?

In March 1997, Congressman Istook requested the BIA furnish him with a report on all the fee-to-trust acquisition applications currently pending before the BIA. The report reflects the name of the applicant, date the application was received by the BIA, tribal affiliation, whether or not the acquisition is an individual Indian or tribe, county and state in which the land is located, approximate acres, and whether or not the land is located on or off the reservation.

By letter dated May 7, 1997, the BIA furnished Congressman Istook the requested report. Information prepared by the office of Congressman Istook totaled the acreage figures reflected on the report and made the statement "The BIA is now placing over 700,000 acres into trust." This statement could lead to a mis-impression that all 700,000 acres will automatically be placed in trust. The acreage figures provided him represents *application acres* and **not** *acres accepted into trust*. Each fee-to-trust application is unique and must be evaluated on its own merits

and a decision rendered by the Secretary to approve or disapprove the application based on the criteria found in 25 CFR 151. The mere act of filing an application does not in itself mean that the land will be placed into trust status.

Additionally, the BIA Navajo Area Office reported that they had *no* fee-to-trust acquisitions applications; however, they did report that they may have "potential" acquisitions of approximately 482,015 acres. This figure was included in Congressman Istook's report even though the Navajo Area Office does not have any pending fee-to-trust acquisition applications. In hindsight, the Navajo Area Office should have reported no pending fee-to-trust acquisition; however, in an effort to be responsive to the congressional inquiry, they submitted the "potential" acquisition applications. There is no certainty that these "potential" acquisitions will come to fruition as applications.

If you subtract the "potential" acquisitions reported by the Navajo Area Office, from the nationwide 700,000 acres reported by Congressman Istook, the nationwide acreage figure drops to approximately 275,000 acres. When this figure (275,000) is broken down between on and off reservation, the approximate number of acres located within the exterior boundaries or "on" the reservation is approximately one-half of the total.

Preliminary figures for the 1996 Annual Report of Indian Lands indicate that the BIA disapproved 40 percent of the applications it received. If this disapproval rate is applied to future applications covering the 275,000 acres, then, only approximately 110,000 acres will be placed in trust.

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Supreme Court, U.S.
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No. 00-746

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency has reasonably interpreted the term "reservation" in Section 301(d)(2)(B) of the Clean Air Act (CAA), 42 U.S.C. 7601(d)(2)(B), to include trust lands validly set apart for the use of an Indian Tribe as well as formally designated reservations.

2. Whether Section 301(d)(2) of the CAA, 42 U.S.C. 7601(d), delegates to eligible Indian Tribes the authority to administer programs for the management of air resources in all areas within the exterior boundaries of their reservations, including lands owned in fee by non-Indians.

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In the Supreme Court of the United States

No. 00-746

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 211 F.3d 1280.

JURISDICTION

The judgment of the court of appeals (Pet. App. 139a) was entered on May 5, 2000. A petition for rehearing was denied on July 12, 2000. Pet. App. 135a-136a. On September 27, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 9, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, establishes an intergovernmental partnership to regulate air quality throughout the Nation. This case involves the proper interpretation of amendments to the Act enacted in 1990 in order to increase the role of Indian Tribes in that partnership.

a. The CAA gives the States primary responsibility for ensuring that ambient air meets federally established standards. See 42 U.S.C. 7407(a). The States discharge that responsibility by developing State Implementation Plans (SIPs) that "provide[] for implementation, maintenance, and enforcement" of those air quality standards. 42 U.S.C. 7410(a)(1). Once SIPs have been approved by the Environmental Protection Agency (EPA), they are federally enforceable. 42 U.S.C. 7509(a)(4).

The CAA also establishes several other programs designed to protect and enhance the quality of the Nation's air resources. For example, Part C of Title I of the CAA creates a program for the "prevention of significant deterioration" (PSD) of air quality in areas where the air is cleaner than required by federal standards. 42 U.S.C. 7470-7492. Areas subject to the PSD program receive one of three classifications (Class I, II, or III) that specify the maximum amount of air quality deterioration allowable in the areas. 42 U.S.C. 7472-7474. The least deterioration is permitted in Class I areas. 42 U.S.C. 7473. Section 164(a) of the CAA authorizes the States to redesignate areas under their jurisdiction as Class I. 42 U.S.C. 7474(a).

Section 116 of the CAA generally preserves the authority of the States to regulate air pollution under their own laws. 42 U.S.C. 7416. Those state regu-

lations, however, must be at least as stringent as applicable federal requirements. 42 U.S.C. 7416.

b. In 1990, Congress passed a compendium of amendments to the CAA, several of which addressed the role of Indian Tribes under the Act. Most significant for this case, the 1990 Amendments added Section 301(d), which grants EPA the "author[ity] to treat Indian tribes as States" under the Act, 42 U.S.C. 7601(d)(1), subject to the following requirements:

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CAA] and all applicable regulations.

42 U.S.C. 7601(d)(2).

Section 301(d)(2) directs the EPA to promulgate regulations "specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States." 42 U.S.C. 7601(d)(2). "In any case in which the [EPA] determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the [EPA] may provide, by regulation, other means by which the Administrator will directly administer [the applicable provisions of the Act] so

as to achieve the appropriate purpose." 42 U.S.C. 7601(d)(4).

The 1990 Amendments also revised Section 110 of the Act, which governs SIPs, to address Tribal Implementation Plans (TIPs). 42 U.S.C. 7410(*o*). Tribes are not required to submit TIPs, but, if a Tribe submits a plan, the EPA reviews the plan in accordance with the provisions for review of state plans, except as the EPA has otherwise provided in the regulations promulgated under Section 301(d)(2). If the EPA approves a TIP, "the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. 7410(*o*).

Finally, the 1990 Amendments left in place Section 164(c), which was enacted in 1977. That Section provides, in relevant part, that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated [pursuant to the PSD program] only by the appropriate Indian governing body." 42 U.S.C. 7474(c).

2. In 1998, the EPA promulgated the Tribal Authority Rule (TAR), 40 C.F.R. Pt. 49, which implements the directive in Section 301(d)(2) of the CAA that the EPA promulgate regulations addressing how Tribes may be treated as States under the Act. See Pet. App. 50a-134a. Under the TAR, a Tribe may be treated in the same manner as a State for all of the core CAA programs, including the establishment of TIPs and redesignations under the PSD program. As provided in Section 301(d)(2)(B), a Tribe may implement a CAA program only "within the exterior boundaries of the reservation" or "other areas within the tribe's juris-

diction." 40 C.F.R. 49.6(c). The EPA determined that Section 301(d)(2), viewed in the context of the CAA as a whole, "is a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation." Pet. App. 53a-54a. That grant of authority, the EPA concluded, embodies "a territorial view of tribal jurisdiction" and does not "distinguish[] among various categories of on-reservation land" but allows eligible Tribes "to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation." *Id.* at 54a. The EPA reasoned that its interpretation of the scope of tribal authority is supported by the language and legislative history of Section 301(d)(2)(B), *id.* at 54a-62a, and that a "territorial approach to air quality regulation best advances rational, sound air quality management" because of the "high mobility" and "areawide effects" of air pollutants (59 Fed. Reg. 43,956, 43,959 (1994)).

The EPA also concluded that the term "reservation" in Section 301(d)(2)(B) includes Pueblos and "trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a 'reservation.'" Pet. App. 66a. In reaching the conclusion that the term "reservation" includes trustlands, the EPA relied on the meaning given to "reservation" in cases interpreting 18 U.S.C. 1151, the Indian country statute, because the CAA does not define the term. Pet. App. 66a-67a (citing *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991)).

Finally, the EPA determined that Section 301(d)(2)(B)'s reference to "other areas within the tribe's jurisdiction" authorizes Tribes to implement

CAA programs in non-reservation areas over which they can demonstrate jurisdiction under general principles of federal Indian law. Pet. App. 70a. The EPA explained that disputes about a Tribe's jurisdiction over particular non-reservation areas would be addressed "on a case-by-case basis in the context of particular tribal applications." *Id.* at 71a.

3. Petitioners and others sought review of the TAR in the United States Court of Appeals for the District of Columbia Circuit. As relevant to the claims before this Court, the court of appeals denied the petitions for review. Pet. App. 1a-49a.[1]

The court of appeals first upheld the EPA's conclusion that the CAA delegates authority to eligible Tribes to regulate air resources on all land within reservations, including fee land owned by non-Indians. Pet. App. 11a-21a. The court noted that the "EPA suggests, not implausibly," that Tribes might have "inherent sovereign power" to regulate air pollution on non-Indian-owned fee lands within reservation boundaries under the principle, recognized in *Montana* v. *United States*, 450 U.S. 544, 564 (1981), that Tribes may exercise authority over non-Indians on fee lands if their behavior "has some direct effect on * * * the health or welfare of the tribe." Pet. App. 11a-12a. The court did not address that question, however, because it upheld the EPA's conclusion that the CAA contains a delegation of authority. The court explained that the "statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction' carries with it the implication that Congress considered the areas within

[1] The court of appeals also dismissed other challenges on other grounds, but petitioners do not renew those claims in this Court.

the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction." *Id.* at 13a. The court noted that this approach furthers the CAA's purpose "to ensure *effective* enforcement of clean air standards" by avoiding a "'checkerboard' pattern of regulation within a reservation's boundaries," which would be problematic because of the high mobility and area-wide effects of air pollutants. *Id.* at 13a-14a. The court also found support for the EPA's conclusion in the drafting history of Section 301(d), because the phrase "within the exterior boundaries of the reservation" was substituted for the language in the bill as originally introduced—"within the area of the tribal government's jurisdiction." *Id.* at 14a-15a. Finally, the court noted that the EPA's conclusion is consistent with cases in which this Court has found congressional delegations of authority to Tribes over non-Indian lands within reservation boundaries. *Id.* at 17a-19a (citing *United States* v. *Mazurie*, 419 U.S. 544 (1975), and *Rice* v. *Rehner*, 463 U.S. 713 (1983)).[2]

The court of appeals also upheld as reasonable the EPA's construction of "reservation" to include trust lands and Pueblos as well as formally designated reservations. Pet. App. 21a-26a. The court explained that "the Act nowhere defines 'reservation.'" *Id.* at

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[2] Judge Ginsburg dissented from this portion of the court's opinion. Pet. App. 38a-49a. He concluded that Section 301(d)(2) is not an express delegation of authority for Indian Tribes to regulate the conduct of non-Indians on fee land within reservation boundaries. *Id.* at 49a. He further concluded, however, that Section 110(o) *is* such an express delegation, although the authority it provides extends only to the promulgation of TIPs and not to other powers under the CAA. *Id.* at 42a. He also explained that Tribes might, under *Montana*, have inherent authority to exercise those other powers. *Id.* at 49a.

22a. The court concluded that the interpretation given the term by the EPA is consistent with its dictionary definition, its use in various federal statutes, the legislative history, and judicial precedent. *Id.* at 23a-25a. Finally, the court of appeals held that the EPA reasonably concluded that Tribes may propose TIPs and make redesignations under the PSD program with respect to non-reservation lands over which the Tribes demonstrate that they possess authority under ordinary principles of federal Indian law. *Id.* at 26a-28a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. This Court's review is therefore not warranted.

1. a. Contrary to petitioner's contention (Pet. 14-21), the court of appeals correctly concluded that the EPA reasonably interpreted "reservation" to include trust lands "validly set apart for use by a tribe, even though that land has not been formally designated as a 'reservation'" (Pet. App. 66a). See *id.* at 22a-26a (applying *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

As the court of appeals explained (Pet. App. 22a-25a), the CAA does not define "reservation," and that term is ambiguous. Although "reservation" is sometimes used to refer to formally-designated reservations, it is also frequently used in the broader sense adopted by the EPA. In still other instances, the term "reservation" refers to even broader classes of Indian lands. See, *e.g.*, 25 U.S.C. 3202 (includes lands held by Alaska Native Corporations under the Alaska Native Claims Settlement Act). As the court further noted, the dictionary definition of the term and its use in various federal

statutes comports with the EPA's interpretation. See Pet. App. 23a-24a (citing *inter alia Webster's Third New International Dictionary* 1930 (1993); 7 U.S.C. 1985(e)(1)(A)(ii) (1994 & Supp. V 1999); 7 U.S.C. 2012(j); 25 U.S.C. 1452(d); 25 U.S.C. 1903(10)). Statements in the Senate Committee report referring to tribal authority to administer and enforce the CAA "in Indian lands" and in "Indian country" also support EPA's interpretation. See S. Rep. No. 228, 101st Cong., 1st Sess. 79, 80 (1989); 18 U.S.C. 1151 (defining "Indian country" to include more than just formally designated reservations). As the court of appeals concluded (Pet. App. 25a), given the ambiguity of the term "reservation," the EPA reasonably interpreted that term, as this Court and the courts of appeals have interpreted it in related contexts, to include both formal and informal reservations, the latter including trust lands outside of formal reservations. See *ibid.* (citing *Oklahoma Tax Comm'n*, 498 U.S. at 511; *United States* v. *John*, 437 U.S. 634, 649 (1978); *United States* v. *Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States* v. *Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986)). See also *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

Petitioners err in contending (Pet. 16) that the court of appeals relied solely on the absence of an express definition in the Act and the dictionary to determine the scope of the term "reservation." As we have described, the court of appeals concluded that the EPA reasonably interpreted the term "reservation" only after reviewing the use of the term in a variety of other federal statutes, as well as the text of the Act and the term's "ordinary or natural meaning," *Smith* v. *United States*, 508 U.S. 223, 228 (1993). See Pet. App. 22a-24a. The court correctly concluded that the varying defini-

tions of "reservation" in the U.S. Code "lay to waste petitioners' argument" that the term is susceptible of only one meaning. *Id.* at 24a. Further, noting the many statutory provisions in which Congress has expressly defined the term "reservation," the court of appeals properly reasoned that Congress could have limited the term as petitioners suggest, but did not do so. *Ibid.*

Petitioners' argument (Pet. 17) that "reservation" must be given the meaning that the EPA had previously given the term under the PSD program is also off the mark. Petitioners argue that Congress was presumably aware of the definition used under that program and implicitly adopted that definition by not expressly rejecting it. That argument stands Congress's decision not to define "reservation" on its head. If Congress had wanted to mandate a particular definition of reservation, it could have done so; instead, Congress chose to entrust the EPA with that task. Moreover, to the extent Congress should be presumed to have been aware of the definition that the EPA had given "reservation" under the PSD program, Congress also should be presumed to have been aware of the broader definition that Congress and the courts had given the term in a variety of contexts, see pp. 8-9, *supra*. There is no reason to assume that Congress by its silence intended to adopt the narrower definition rather than the broader one.

Petitioners are also mistaken in asserting (Pet. 17-18) that the court of appeals' holding regarding the meaning of "reservation" must be rejected because it is "tantamount" to a conclusion that Congress gave the EPA discretion to decide what lands Tribes could redesignate. Congress, not the EPA, endowed both States and Tribes with the redesignation power, which Tribes can exercise for reservations and for other areas

over which they can show jurisdiction. See, *e.g.*, 42 U.S.C. 7474(c), 7601(d). To the extent that petitioners quarrel with the "authority that the CAA grants to states and tribes to redesignate clean air areas within their respective jurisdictions" (Pet. 14-15), their quarrel is not with the EPA but with Congress.[3]

Petitioners' contention that the EPA's interpretation of "reservation" has "stripped from the states the authority they previously possessed to redesignate [trust] lands" (Pet. 13) is also incorrect. As the court of appeals recognized (Pet. App. 25a), trust lands are Indian country, and federal law generally prohibits States from exercising regulatory authority in Indian country unless Congress has specifically authorized such action, *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 216 & n.18 (1987). Thus, even if Tribes could not redesignate trust lands, States generally would not have the authority to do so.[4] See 42 U.S.C. 7601(d)(4) (EPA may directly administer provisions of the Act for which it determines that Indian Tribes should not be treated as identical to

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[3] Petitioners' related assertion (Pet. 15) that the EPA's interpretation gives "tribal governments unbridled ability to impose Class I standards affecting vast areas of a sovereign state" is likewise misdirected. Air pollution regulation necessarily has extraterritorial effects. Just as actions by Tribes may affect adjacent States, actions by States may affect both adjacent tribal lands and other States. Congress recognized those facts and expressly provided a process under which the EPA would resolve disputes between Tribes and States over proposed redesignations. 42 U.S.C. 7474(e).

[4] Indeed, petitioners acknowledge that "the Act has never been understood as granting to states regulatory authority over sources within their boundaries that states could not otherwise regulate under state law." Pet. 23.

States). Moreover, because trust lands ordinarily are subject to tribal jurisdiction under general principles of federal Indian law, they would be "other areas within the tribe's jurisdiction" under Section 301(d)(2)(B) if they were not "reservation[s]." Consequently, eligible Tribes would have authority to administer the Act in trust lands even if petitioners were correct that trust lands are not properly considered "reservation[s]."[5]

Finally, petitioners erroneously argue (Pet. 18-19) that the court of appeals should not have accorded *Chevron* deference to the EPA's interpretation of "reservation" because the interpretation raises constitutional problems. That argument is based on petitioners' mistaken assertion that the Secretary of the Interior has "unreviewable discretion" to take lands into trust. As an initial matter, any constitutional problem that might be raised by the Secretary's authority to take land into trust has no bearing on the wholly separate question whether the EPA has properly interpreted "reservation" in the CAA. In any event, there is no constitutional problem, because the Secretary does not have "unreviewable discretion" to take

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[5] Petitioners label as "inexplicable" (Pet. 18 n.13) the court of appeals' conclusion that Tribes are authorized by Section 301(d)(2)(B) to administer the Act with respect to lands under their jurisdiction that are located outside reservation boundaries. Section 301(d)(2)(B), however, plainly provides that Tribes may be treated as States with respect to both lands "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction." 42 U.S.C. 7601(d)(2)(B). As the court of appeals explained (Pet. App. 26a-28a), and petitioners now appear to acknowledge (Pet. 18 n.13), Section 164(c), 42 U.S.C. 7474(c), does not provide otherwise. Petitioners' current argument, which relies on Section 164(a), 42 U.S.C. 7474(a), is also misplaced, because it rests on the incorrect premise that States have general authority over Indian lands.

land into trust. The Secretary's discretion is constrained by constitutionally adequate standards. See *United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999), cert. denied, 120 S. Ct. 1960 (2000).[6] And Interior Department regulations expressly "permit[] judicial review [of the Secretary's decision] before transfer of title to the United States." 61 Fed. Reg. 18,082 (1996); see 25 C.F.R. 151.12. See also *McAlpine* v. *United States*, 112 F.3d 1429, 1432-1435 (10th Cir.) (Secretary's decision to take land into trust is subject to judicial review under the Administrative Procedure Act (APA) because the standards set out in 25 C.F.R. 151.10 provide adequate law to apply), cert. denied, 522 U.S. 984 (1997).[7]

b. Petitioners also err in contending (Pet. 21-22) that the holding of the court of appeals conflicts with the

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[6] Petitioners rely (Pet. 16) on *South Dakota* v. *Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), which held Section 5 of the Indian Reorganization Act unconstitutional under the nondelegation doctrine. That decision, however, was vacated by this Court and remanded to the Secretary in light of the regulations cited in the text following this note. See *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996).

[7] In *Florida Department of Business Regulation* v. *Department of the Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986), the Eleventh Circuit held that the Secretary's decision to take land into trust was not reviewable under the APA, but that decision predates the current regulatory scheme, which (as we have explained above) provides additional standards to guide the Secretary's discretion and expressly notes that there is judicial review of the Secretary's decision. The regulatory framework is currently in the process of further refinement: The Department of the Interior has issued a proposed rule to revise 25 C.F.R. Part 151 to clarify further the process and standards that the Secretary applies in implementing her authority to accept title to land in trust. See 64 Fed. Reg. 17,574 (1999).

decision of the Ninth Circuit in *Arizona* v. *EPA*, 151 F.3d 1205 (1998), as amended, 170 F.3d 870 (1999). The *Arizona* case did not address either the validity of the TAR or the proper interpretation of Section 301(d). Nor did the court of appeals in *Arizona* hold that tribal trust lands could not constitute "reservation[s]" under the CAA. The court held only that there was insufficient evidence in the record to determine whether certain parcels of land had been "declared to be reservations by Act of Congress or that these parcels ha[d] been added to the Middle Verde reservation by proclamation of the Secretary of the Interior pursuant to the Indian Reorganization Act." 151 F.3d at 1210-1211. The court said nothing about whether those parcels might otherwise be reservations and, indeed, "remand[ed] to EPA, without prejudice to the parties, to determine whether the parcels are reservations for purposes of 42 U.S.C. § 7474(c)." 170 F.3d at 870.

2. a. Contrary to petitioners' further contention (Pet. 22-26), the court of appeals correctly determined that Section 301(d)(2) delegates authority to eligible Tribes to administer the CAA on fee lands within reservation boundaries.

This Court has made clear that Congress may, by statute, delegate federal authority to a Tribe. *Mazurie*, 419 U.S. at 554. The first clause of the second sentence of Section 301(d)(2) (which authorizes the EPA to treat eligible Tribes as States), together with Section 301(d)(2)(B) (which establishes Tribal authority over air resources on all lands within the exterior boundaries of a reservation), make clear the meaning of Section 301(d)(2): The EPA is authorized to treat an otherwise eligible Indian Tribe as a State for programs governing *any* air resources within the exterior boundaries of a reservation, *without the need for further inquiry by*

EPA into the Tribe's inherent authority over those resources. See 42 U.S.C. 7601(d). As the court of appeals explained (Pet. App. 13a), the "statute's clear distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction' carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction."

As the court of appeals also noted (Pet. App. 13a-14a), this interpretation furthers the CAA's purpose "to ensure *effective* enforcement of clean air standards" by avoiding a "'checkerboard' pattern of regulation within a reservation's boundaries," which would be problematic because of the high mobility and area-wide effects of air pollutants. See also 59 Fed. Reg. at 43,959. The court of appeals' conclusion is further supported by the drafting history of Section 301(d), because the phrase "within the exterior boundaries of the reservation" was substituted for the language in the bill as originally introduced—"within the area of the tribal government's jurisdiction." See Pet. App. 14a-15a.

In reaching its conclusion, the court of appeals correctly relied on this Court's decisions in *Mazurie*, 419 U.S. at 556-557, and *Rehner*, 463 U.S. at 728-729, in which this Court "found an express delegation despite the absence of any 'we hereby delegate' language in the statute." Pet. App. 18a. In *Mazurie* and *Rehner*, this Court "did not find any precise language of delegation in the disputed statute, but, rather, rested on the implication inherent in recognizing the power of tribes to adopt an ordinance pertinent to liquor transactions on Indian country." *Ibid.* Similarly, in reliance on those cases, the court of appeals here properly found in the CAA "an express congressional delegation from the

implication inherent in the distinction between areas 'within the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction.'" *Ibid.* The contrary reading advanced by petitioners would render this careful formulation superfluous. Had Congress intended that Tribes have jurisdiction only where they could demonstrate inherent jurisdiction, Congress could easily have so provided, without resort to the more complex either/or formulation employed in Section 301(d). Indeed, as we have noted, that formulation was substituted for one based on "the tribal government's jurisdiction" that was in an earlier version of the bill.

Petitioners incorrectly contend (Pet. 22-23, 26) that CAA Section 116, 42 U.S.C. 7416, precludes Section 301(d)(2) from constituting a delegation to eligible Tribes of authority over fee lands within reservation boundaries.[8] Section 116 preserves the ability of States to adopt and enforce under state law air pollution standards that are more stringent than those required under the CAA. Section 116 thus serves the dual purpose of preserving state police power to protect public health and welfare and ensuring that state exercise of that power is consistent with otherwise

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[8] 42 U.S.C. 7416 provides, in relevant part, that "nothing in this chapter shall preclude or deny the right of any State * * * to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State * * * may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

applicable federal law.[9] Section 116, however, does not grant States authority to regulate air pollution activity in Indian country, which includes fee lands within reservation boundaries.

Section 116 is silent on the question of geographical jurisdiction. Thus, Section 116 assumes and is subject to the same geographic jurisdictional limitations on state authority that apply to other provisions of the Act. Nothing in the Act gives States authority over lands within Indian country. And, as we have explained, absent delegation by Congress, States do not generally have comprehensive authority over such lands. See *Cabazon*, 480 U.S. at 207, 216 n.18; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); p. 11, *supra*. In situations in which a Tribe does not have EPA approval to implement the Act, the EPA—not the State—generally implements the CAA in Indian country. See, *e.g.*, 42 U.S.C. 7601(d)(4).[10]

b. Finally, petitioners argue (Pet. 24) that the Ninth Circuit has, in their view, "embraced an approach" to delegation questions that "conflicts with the approach" taken by the court of appeals in this case. Petitioners assert (Pet. 25) that, if the Ninth Circuit were faced

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[9] See 136 Cong. Rec. 36,077 (1990) ("Consistent with the general provisions of section 116 of the Clean Air Act, the conferees understand that a State may establish additional more stringent permitting requirements, but a State may not establish permit requirements that are inconsistent with the national permitting requirements of this act, including this title.") (discussing Section 506(a), an analogous provision within the Title V operating permit program added by the 1990 Amendments).

[10] We recognize that, in some situations, States may exercise regulatory authority in Indian country under state law. If a State has such authority, Section 116 preserves the State's ability to implement more stringent air pollution controls.

with the question whether Section 301(d)(2) constitutes a delegation to Tribes, the Ninth Circuit "would disagree" with the conclusion by the D.C. Circuit that it does.

The Ninth Circuit, however, has granted rehearing en banc in the case on which petitioners rely, *Bugenig* v. *Hoopa Valley Tribe*, 229 F.3d 1210 (2000), rehearing en banc granted (Feb. 28, 2001). In any event, that case concerns the question whether the Hoopa-Yurok Settlement Act of 1988 granted the Hoopa Valley Tribe authority over a particular parcel of reservation land that was owned in fee by a non-Indian. The question whether CAA Section 301(d)(2) constitutes a delegation to Tribes is not before the Ninth Circuit. Indeed, as petitioners themselves point out (Pet. 12 n.9), the Section 301(d)(2) question could not come before the Ninth Circuit. See 42 U.S.C. 7607(b)(1). Thus, there is no present conflict of decisions, and the Ninth Circuit's resolution of *Bugenig*, whatever its result, will not create a conflict that warrants this Court's review. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

The D.C. Circuit held that the U.S. Environmental Protection Agency (EPA) reasonably defined the term "reservation" in the Clean Air Act (CAA) as including lands, located outside the boundaries of formal reservations, which are taken into trust for tribes pursuant to the Indian Reorganization Act (IRA). As a consequence, tribes are now authorized to redesignate under CAA § 164(c) such current and future trust lands to a more stringent air quality classification, an action that can override the implementation by a state of its own industrial land use and natural resources management policies, preclude construction of new industrial facilities, and impose costly restrictions on the operation of existing facilities in state lands bordering the redesignated tribal lands. The court also held that the CAA expressly delegates to tribes authority to adopt air programs for lands within reservations that are owned in fee by non-Indians and that were subject to state air quality regulation prior to the 1990 Amendments to the CAA. The questions presented are:

1. Whether EPA has the discretion to interpret the CAA in a manner that expands the lands tribes may redesignate to include IRA trust lands and other lands located outside of reservations established by treaty, Executive Order, or Act of Congress.

2. Whether the CAA can be construed as divesting the states of their sovereign authority by delegating authority to tribes over non-Indian fee lands previously within the

QUESTIONS PRESENTED – Continued

sovereign jurisdiction of a state, when the CAA expressly provides that no provision therein precludes or denies a state's authority to adopt and enforce standards for lands within its territorial boundaries.

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STATEMENT

The States of New Mexico, Nevada and South Dakota (Amici States) urge the Court to grant the *writ of certiorari* sought in this case by the State of Michigan and the other petitioners.

This case presents important issues of critical implication regarding preservation to the States of their rights throughout their sovereign lands to design and implement its general long-term development strategies, including industrial land use and natural resources management policies, to further the objectives of the State, its citizens and inhabitants.

In its decision below, involving federal Indian law and the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (CAA or the Act), the D.C. Circuit has fundamentally rearranged the balance of state and tribal jurisdiction. The court's unprecedented decision permits tribes to exercise CAA authority not only over lands that had been formally established as tribal reservation lands at the time the CAA was enacted, but also over additional and ever-accumulating parcels of land taken into trust for the benefit of the tribes by the U.S. Secretary of the interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq. (IRA).

ARGUMENT

Under the CAA, lands were designated as "Class I", "Class II", or "Class III". An area's designation establishes the maximum degree to which concentrations of

various regulated pollutants over baseline levels are permitted to increase in that area. These increases are known as "increments". Under CAA § 163(b), the increments for Class I were made four to 10 times more stringent than the corresponding Class II increments.

Lands can also be redesignated from Class II to Class I upon proposition by a State or Tribe. CAA § 7474(a) and (c). Importantly, CAA § 7474(c) limits Class I redesignation by a tribe to "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes. . . . " The importance of this provision is magnified by the fact that Class I redesignation, which establish these very stringent restrictions on the deterioration of air quality, are enforceable against sources of pollution both inside and outside the redesignated area. Redesignation of an area to Class I not only affects land use and natural resource policy planning and implementation within the area being redesignated, but also affects proposed development and operations 50 to 80 miles outside those areas.[1]

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[1] See, e.g., 40 C.F.R. § 52.21(p); EPA New Source Review Workshop Manual, October 1990, at E.16 ("The meaning of the term 'may affect' [in CAA § 165(d)] is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class I area."). EPA has more recently proposed that permit information received from sources proposing to locate or to construct a major source modification up to 250 kilometers (155 miles) away, be input into a database which can then be accessed by a Class I tribal air quality manager. See 61 Fed. Reg. 38,287-288 (July 23, 1996).

In 1990 Congress enacted major revisions to the CAA and directed the United States Environmental Protection Agency (EPA) to "promulgate regulations . . . specifying those provisons" of the CAA "for which it is appropriate to treat Indian tribes as States," with such treatment of a given tribe being authorized under the Act "only if" certain specified conditions are met. CAA § 301(d)(2). Among other things, the "functions to be exercised" by the tribe have to "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA § 301(d)(2)(B).

Congress, when it enacted the CAA § 164 redesignation provisions in 1977, was codifying a prior EPA regulatory program that defined the term "reservation" to mean "any federally-recognized reservation *established by Treaty, Agreement, Executive Order, or Act of Congress.*" 40 C.F.R. § 52.21(b)(4)(1974) (emphasis added). As a result of Congress's action in 1977, state lands and tribal lands subject to redesignation were specifically delineated. States could redesignate all lands outside formal reservation lands. Tribes could redesignate formal reservation lands. EPA reaffirmed that understanding in rules the Agency adopted following passage of the 1977 CAA Amendments by continuing to define "reservation" to mean a federally-recognized reservation "established by Treaty, Agreement, Executive Order, or Act of Congress." See 40 C.F.R. § 52.21(b)(15) (1978); 43 Fed. Reg. 26,404 (June 19, 1978).

Despite this apparent limitation on tribal Class I redesignation to formally established Indian reservations, EPA promulgated regulations collectively known as the

Tribal Authority Rule (TAR), 63 Fed. Reg. 7254 (February 12, 1998); 40 C.F.R. Part 49, with language that authorizes tribes to redesignate lands *outside* formal reservations, including trust lands that have been established in the past, or may be created in the future, by the U.S. Secretary of the Interior under the IRA. The U.S. Court of Appeals for the D.C. Circuit affirmed EPA's rule based on an interpretation of the Act that allows tribes to redesignate IRA trust lands. The D.C. Circuit's decision is contrary to congressional intent.

The acquisition by tribes of lands remote from reservations that are then taken in trust under the IRA has exploded in recent years. As these remote IRA trust lands proliferate throughout a state, tribal influence and even control over a state's land use and natural resources policy regarding an ever expanding percentage of the geographical area of the state is possible. Under the D.C. Circuit's decision, tribes are now able to threaten use of their Class I redesignation authority to override state and local government industrial land use planning decisions, to restrict operation of existing facilities, to even block new industrial and residential development, and to otherwise impact a State's natural resource policies.

The situation is doubly problematic because of the aggressiveness of the Department of Interior in taking land into trust. *See generally, South Dakota v Department of Interior,* 69 F.3d 878 (8th Cir. 1995), *vacated and remanded for reconsideration,* 519 U.S. 919 (1996). Moreover, under the Interior Board of Indian Appeals' interpretation of the land-into-trust regulations set out at 25 C.F.R. 151, review of the action of the Department is extremely limited. *See, Village of Ruidoso v. Albuquerque Area Director,*

IBIA 96-103-A (April 14, 1998). A new final regulation regarding trust acquisitions has been issued, *see* 66 Fed. Reg. 3459 (January 16, 2001), but has not gone into effect pending a sixty day review by the incoming administration. *See*, 66 Fed. Reg. 10815 (Feb. 20, 2001). In any event, the new regulation would extend only grossly insufficient substantive protections to the states and local units of government and, indeed, purports to create a new vehicle – a Tribal Land Acquisition Area – to facilitate the taking of land into trust for certain tribes. *See*, 66 Fed. Reg. 3459. Supreme Court review of the D.C. Circuit's decision is thus imperative, if a constitutionally-sound balance between state and tribal authority is to be restored.

The D.C. Circuit decision allows tribes to take away from states their exclusive jurisdiction to redesignate state lands, despite the 1977 Amendments, which explicitly grant such authority to the states. Under the D.C. Circuit decision, once the Secretary of the Interior takes lands into trust, the tribe, not the state, is then authorized to redesignate such lands. This is inconsistent with the Clean Air Act.

CONCLUSION

This Court should not allow the D.C. Circuit decision affirming and interpreting the TAR to remain intact. If it does allow the decision to remain intact, states would be powerless to prevent the accelerating trend of additional lands, though remote from formal reservations and located anywhere throughout a state, being placed in trust for Indian tribes pursuant to the IRA, and then being proposed for redesignation to Class I. Because

tribal trust lands can be located anywhere throughout a state, and because tribal Class I redesignations impact state policy regarding lands up to 80 miles outside the immediate Class I land area, the current tribal Class I redesignation trend would force states, against their will and despite prior long-term development strategies, to reconcile the stringent Class I requirements with their industrial land use and natural resource management policies and practices regarding vast areas of a state, and in some cases, potentially encompassing the entire state. In sum, if the TAR remains in tact, a state's ability to direct its future development and realize its citizens' goals, would be dramatically diminished.

For these reasons and the reasons stated in the Petition of the State of Michigan, et al., the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al*,
Petitioners,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby incorporate by reference the corporate disclosure statement filed with the petition for a writ of certiorari on November 9, 2000.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The D.C. Circuit ruled that lands taken into trust pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA), located outside the boundaries of formal reservations – those established by treaty, Executive Order, or Act of Congress – constitute reservation lands for purposes of the Clean Air Act (CAA or the Act). This ruling raises important issues that go to the heart of state-tribal relations. The decision below permits tribes to redesignate such lands to the more stringent "Class I" air quality status. This action affords tribes unilateral and extraterritorial authority to constrain or even stop growth and development by non-Indians on lands under state land use jurisdiction.

The IRA was enacted both to reverse the alienation of Indian lands that had resulted from the General Allotment Act of 1887, as well as to establish a mechanism for recovery of lands for tribes. On the face of the IRA, the only consequence of taking land into trust is to exempt such land from state and local taxation. IRA § 5. Courts have generally held, however, that a very significant additional consequence flows from lands being taken into trust under the IRA – *i.e.*, the loss of state and local regulatory jurisdiction over such lands.

The IRA itself would appear to provide no decisional criteria to govern the Secretary's exercise of discretion in taking lands into trust, other than, perhaps, that the land be taken for the beneficial use of the tribe or individual Indian. *See U.S. v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). The Secretary's view of her discretion to take lands into trust is bounded only by the self-imposed requirement that she consider a series of factors identified in the Bureau of Indian

Affairs regulations set forth at 25 C.F.R. Part 151.[1] None of these listed factors involves the CAA regulatory consequences that may flow from the Secretary's decision to take land into trust. Judicial review is thus limited to a procedural inquiry into whether various factors, all irrelevant to the CAA, were "considered" by the Secretary. *See McAlpine v. U.S.*, 112 F.3d 1429, 1434 (10th Cir. 1997).

The D.C. Circuit's decision adds a new and very troubling dimension to the Secretary's authority under the IRA to take lands into trust. The court found that, because Congress did not specifically define the term "reservation" in the CAA, EPA had the discretion, under the second prong of *Chevron*, to interpret the Act as giving tribes authority to redesignate IRA trust lands located outside the boundaries of formal reservations.

Under EPA's interpretation of the CAA, the creation of IRA trust lands by the Secretary now has an additional ramification: the expansion of the extraterritorial authority that tribes possess under the CAA over the activities of non-Indians on non-Indian lands. This is a consequence certainly not envisioned by Congress when it enacted the IRA in 1934, and one which the Secretary need not even consider prior to taking lands into trust. Moreover, given that the CAA commits tribal redesignation decisions solely to the discretion of the tribe,[2] the EPA interpretation upheld by the

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[1] *But see Whitman v. American Trucking Ass'n*, No. 99-1257, slip op. at 12 (U.S. Feb. 27, 2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.").

[2] While CAA § 164(b) establishes procedures that states and tribes must following in proposing redesignations to Class I, it contains no substantive decisional criteria governing EPA's approval of such redesignations. To the contrary, EPA is authorized to disapprove such a redesignation "only if [the Agency] finds . . . such redesignation does not meet the procedural requirements" of CAA § 164. *See* CAA § 164(b)(2).

D.C. Circuit gives the Secretary the discretion to create tribal power under the CAA without there being any guidance governing the exercise of that discretion under either the IRA *or* the CAA, or, for that matter, any supervision by EPA of the Secretary's exercise of that discretion.

Petitioners are unaware of any federal regulatory statute that has ever been interpreted by the agency assigned by Congress to administer that statute as *implicitly* delegating to *another* federal agency the authority to create regulatory powers in a non-federal instrumentality (such as an Indian tribe) without any explicit guidance from Congress governing that delegation, or without any oversight by the agency administering the statute. Petitioners are unaware, until the D.C. Circuit's decision, of any court being asked to sustain, much less sustaining, such a remarkable interpretation of a federal regulatory statute.

EPA does not dispute Petitioners' characterization of the implications of the decision below. EPA does not suggest that Petitioners have overstated the importance of the decision, or contend that Petitioners' concerns are not immediate and concrete.[3] Rather, EPA rests its argument that Court review is "not warranted" *solely* on the grounds that the D.C. Circuit was correct on the merits. EPA Opp. at 8. As explained below, EPA is wrong.

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[3] The brief in opposition by the respondent tribes suggests that Petitioners have "attempt[ed] to elevate the importance of this relatively routine administrative rulemaking to the level of a crisis by misconstruing EPA's action as a dramatic departure from existing precedent and a significant threat to states." Tribes Opp. at 11. The Brief of Amici States in Support of Petitioners, which warns that the D.C. Circuit decision allows tribes to "threaten use of their Class I redesignation authority to override state and local government industrial land use planning decisions, to restrict operation of existing facilities, to even block new industrial and residential development, and to otherwise impact a State's natural resource policies," States Brief at 4, rebuts the tribes' attempt to minimize the decision's importance.

I. Congress Did Not Intend for EPA to Have the Discretion to Construe the CAA to Give the Secretary of Interior Authority to Expand the Lands That Tribes May Redesignate.

When Congress amended the CAA in 1977 to establish an area classification/redesignation scheme, it for the first time explicitly delegated to tribes certain limited, but extraordinary, authority to engage in air quality regulation that could impose land use constraints both inside and outside tribes' formal reservations. What EPA has overlooked is that Congress also delegated similar extraordinary federal authority to the states.

Specifically, Congress in 1977 designated as Class II the entire geographic area of the country (with the exception of certain national parks, which were permanently designated as Class I). *See* CAA § 162. At the same time, Congress created a new federal power: the authority to *re*designate those Class II areas as either the more stringent Class I or the less stringent Class III. *See* CAA § 164.

In the 1977 Amendments, states were given the exclusive power to redesignate *all* of the land area within their geographic borders, *with the sole exception* of "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes." Congress delegated the authority to redesignate "reservation" lands exclusively to the tribes. *See* CAA §§ 164(a), 164(c).

For this reason, EPA's assertions that "trust lands are Indian country," and that "federal law generally prohibits States from exercising regulatory authority in Indian country unless Congress has specifically authorized such action," EPA Opp. at 11, are beside the point. Congress *has* "specifically authorized" states to redesignate those lands in "Indian country" that are not "reservation" lands. That is, with the exception of those specific portions of Indian

country that constitute "lands within the exterior boundaries of reservations," states were given *exclusive* authority by Congress in the 1977 CAA Amendments to redesignate all lands within their geographic borders.

Accordingly, EPA is wrong when its asserts that Petitioners' argument "rests on the incorrect premise that States have general authority over Indian lands." EPA Opp. at 12 n.5. Petitioners do not assert that the states' power to redesignate is an attribute of their inherent sovereignty. Rather, Petitioners' position rests on the fact that the states were delegated by Congress exclusive *federal* authority to redesignate all areas of Indian country within the states' borders *except* for those lands that constitute "reservation" lands within the meaning of CAA § 164(c). While Congress could have delegated to tribes redesignation authority over the entirety of Indian country, it did not do so.

Thus, this case does not turn on general principles of federal Indian law, but on statutory construction. As a result, Congress's intent when it first used the term "reservation" in the 1977 CAA Amendments is of paramount importance.

EPA endorses the D.C. Circuit's finding that, because Congress provided no statutory definition of "reservation" in the CAA, the term is "ambiguous." It should therefore be presumed, says EPA, that "Congress chose to entrust" the Agency with the "task" of defining the term for CAA purposes. EPA Opp. at 10.

As this Court has observed, however, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Words that can have more than one meaning are given content" by "their surroundings." *American Trucking Ass'n*, slip op. at 5, *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). Thus, statutory construction is properly undertaken as a "holistic endeavor," in which a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

Had the D.C. Circuit applied these principles, it would have recognized that, in the case of the CAA, the demarcation of "reservation" lands is precisely what determines the extent to which tribes, through redesignation, are permitted to constrain the activities of non-Indians on non-Indian lands. *See* Cert. Pet. at 14-16. Having failed to apply these principles, however, the court wrongly assumed that, because Congress included no statutory definition of "reservation," it intended to leave the resolution of this issue, with its attendant implications for the balance of state and tribal jurisdiction, to the discretion of EPA. *Cf. American Trucking Ass'n*, slip op. at 8, *citing Christensen v. Harris County*, 529 U.S. 576, 589-90 n. (2000) (Scalia, J., concurring in part and concurring in judgment) ("The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity").

The redesignation provisions in CAA § 164 were enacted against a backdrop in which Congress codified, with certain limited exceptions, the "prevention of significant deterioration" (PSD) program that EPA had adopted in 1974. *See* § 168(b). In those PSD rules, EPA defined the term "reservation" to mean a formal reservation. *See* Cert. Pet. at 6-7. In this context, Congress did not have to define "reservation" in the statute in 1977; the term had already been defined by EPA in 1974. Congress chose not to change that definition, although it did change the definition of other terms. *Compare, e.g.*, 40 C.F.R. § 52.01(f) (1974) *with* CAA § 169(3) (definition of "best available control technology").

EPA argues that there is "no reason to assume" that "Congress by its silence intended to adopt the narrower definition" of "reservation" from the Agency's PSD program, rather than the "broader" definitions found in other federal

statutes. EPA Opp. at 10. However, it is this very "silence" in 1977 (and again in 1990) that indicates Congress's intended preservation of the definition of "reservation" previously employed by EPA, a definition that reflected the conventional and historic understanding of the formal methods by which a "reservation" is created, and the definition in reference to which Congress codified EPA's 1974 PSD rules in 1977. Only if Congress wished to *depart* from that definition to include off-reservation IRA trust lands would a different statutory definition have been necessary.

In sum, EPA and the D.C. Circuit would have this Court believe that Congress in 1977 intended to impart to EPA the discretion, when it promulgated the Tribal Authority Rule (TAR) in 1998, to interpret the term "reservation" as used in CAA § 164 in a manner contrary to how EPA had defined the term in its PSD rules both before and after enactment of the 1977 CAA Amendments. EPA and the D.C. Circuit would also have this Court believe that Congress in 1977 gave EPA the further discretion, when it would later promulgate the TAR, to redefine "reservation" based on the Agency's reading of judicial decisions rendered *after* 1977, and to include in this new definition not only those off-reservation lands which the Secretary of Interior had taken into trust pursuant to IRA § 5, but also all such lands which the Secretary might take into trust in the future. And EPA and the D.C. Circuit would have this Court believe that Congress intended this result without its having provided any guidance in either the CAA or the IRA, or without its requiring EPA to exercise any substantive supervision.

As a fallback position, EPA also argues that, if Congress did not in 1977 delegate to tribes the authority to redesignate lands beyond "reservation" lands, Congress did extend to tribes this further authority in 1990. Because "trust lands ordinarily are subject to tribal jurisdiction under general principles of federal Indian law," EPA claims that they constitute "other areas within the tribe's jurisdiction"

under CAA § 301(d)(2)(B). EPA Opp. at 12. Thus, "eligible Tribes would have authority" to redesignate trust lands "even if petitioners were correct that trust lands are not properly considered 'reservation[s].'" *Id.*

EPA's assertion is refuted by the plain language of CAA § 164(a). Under that provision of the Act, a state's redesignation authority applies to all lands within that state other than reservation lands. EPA's (and the D.C. Circuit's) interpretation of CAA § 301(d)(2) would mean that states and tribes would both have jurisdiction to redesignate the same non-reservation lands. However, states and tribes cannot have concurrent authority to redesignate these same lands – *e.g.*, one reclassifying them Class I, the other reclassifying them Class III.

Thus, had Congress intended to permit tribes to redesignate lands other than "reservation" lands when it enacted CAA § 301(d), it would have also had to have revised CAA § 164(a) to remove from states their exclusive authority to redesignate such lands. Congress did not so revise CAA § 164(a) in 1990 to restrict state redesignation authority over non-reservation lands within the state.

Finally, EPA errs when its suggests that Petitioners' concerns should be assuaged by the process established by CAA § 164(e), under which EPA will "resolve disputes between Tribes and States over proposed redesignations." *See* EPA Opp. at 11 n.3. While EPA is permitted under CAA § 164(e) to negotiate disputes between states and tribes over redesignation requests, the Agency is authorized to disapprove a tribal redesignation request only when certain procedural requirements have not been met. *See* note 2. Where those procedural requirements have been fulfilled, a tribe possesses the absolute discretion to redesignate any lands located within the exterior boundaries of its reservation.

II. Under the CAA, States May Not Be Divested of Any Regulatory Authority They May Have Over Non-Indian Fee Lands.

In light of the significant implications of Congress's "expressly delegating" to tribes regulatory authority over non-Indian fee lands located within a reservation, there are compelling reasons for this Court to review the D.C. Circuit's determination that the "treatment as states" provisions of the 1990 CAA Amendments constitute such a rare delegation. While relying on the D.C. Circuit's decision, EPA's arguments are similarly inadequate..

First, in support of the D.C. Circuit's delegation holding, EPA reiterates the panel majority's conclusion that the distinction that CAA § 301(d)(2)(B) draws between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it "the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction." EPA Opp. at 15. Even if an express delegation could ever be founded on so abstruse an "implication," as Judge Ginsburg correctly observed in his partial dissent, "when one reads the relevant sentence as a whole – rather than focusing solely upon the last phrase – one sees that, rather than expressing a delegation of authority over fee lands and rights-of-ways within a reservation," the sentence "by its terms merely lays down a precondition to the Administrator's treating a tribe as a state." App. 44a. EPA is wrong when it asserts that Petitioners' "contrary reading" would "render this careful formulation superfluous." EPA Opp. at 16.

Second, EPA rejects Petitioners' contention that CAA § 116 precludes the "treatment as states" provisions being construed as constituting an express delegation of authority to tribes, arguing that CAA § 116 "does not grant States authority to regulate air pollution activity in Indian country,

which includes fee lands within reservation boundaries." EPA Opp. at 17. EPA has misconstrued Petitioners' position.

Petitioners do not assert that CAA § 116 *gives* states authority over lands within Indian country, or that EPA lacks authority under the Act to approve tribal regulatory programs for non-Indian fee lands over which a tribe can demonstrate *inherent* authority under the so-called *Montana* "second exception." If a particular tribe is found to have inherent authority over non-Indian fee lands, there is, in effect, no state authority over those lands which CAA §116 serves to retain. At the same time, in those situations where a state possesses authority under its own laws to regulate air quality on non-Indian fee lands – authority which is "preserved" by CAA § 116, as EPA itself concedes (*see* EPA Opp. at 17 n.10) – no *federal* authority over such lands exists under the CAA that can then be delegated to the tribe.

Finally, EPA misconstrues the significance of *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), in which the Ninth Circuit adopted the reasoning of Judge Ginsburg's dissent as a "clear statement rule" for determining delegation questions. *Bugenig* illustrates that the approach taken by the D.C. Circuit's panel majority is, to say the least, subject to serious doubt. Moreover, since Judge Ginsburg had himself misapplied the very test which the Ninth Circuit was now adopting, review by this Court is necessary in order to forestall the injection of more confusion into a field of jurisprudence – federal Indian law – that remains in desperate need of clarity.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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